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ABSTRACT

Recent legal decisions, coupled with Federal and State statutes, require the New York City Board of Education to follow definite guidelines in providing equal educational opportunities for its handicapped children. Among the problems raised are those of classification and labeling, criticized by some as a procedure that focuses more on pathology than on a child's assets; exclusion and special education assignments, which raise questions of equal educational opportunity and due process; and IQ testing, which is often seen as culturally biased and resulting in the disproportionate placement of minority children in special education classes. Even with more stringent legal regulations that guarantee due process and equal protection, more effort is needed in refining the use of labeling to meet individual needs, in encouraging mainstreaming where possible, and in insuring nondiscriminatory testing procedures. Appendices include abstracts of legal cases and regulations of governmental agencies relating to handicapped children. (WP)

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LEGAL ISSUES IN THE CLASSIFICATION OF HANDICAPPED CHILDREN IN NEW YORK CITY

SPECIAL REPORT NO. 1 IN A SERIES: ASSURING EQUAL EDUCATIONAL OPPORTUNITY FOR HANDICAPPED CHILDREN IN NEW YORK CITY

JANUARY 1977

(Second Edition: May 1977)

BOARD OF EDUCATION OF THE CITY OF NEW YORK

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PREFACE

Equal educational opportunity for "handicapped" children has long been a major concern of public school officials in New York City. Almost fifty years ago, Associate Superintendent Margaret J. McCoovey championed our school system's pioneering efforts on behalf of the handicapped. Using language that is strikingly contemporary, she stated that our special education program had as its primary objective, the assurance of an "equal chance" for each handicapped child. Though inadequate by today's standards, that program's "classification" of the handicapped was aimed at focusing attention on the unique educational needs of such pupils and buttressing appeals for public financial support. From modest beginnings, our special education program has grown enormously. In 1975, this program served approximately 77,000 pupils -- more than 37,000 on a full-time basis and an additional 40,000 on a part-time basis.

Though there has been phenomenal growth in our school system's special education program, the process of expansion has not come easily. Due to the large cost differentials involved in providing special education services, public school officials here and throughout the country have traditionally extended such services with great caution.* In the past decade particularly, school systems have grappled with the needs of the

*For a detailed report on special education costs, see B.R. Gifford and L.S. Marriner, "The Cost of Educating Handicapped Children in New York City's Public Schools," Office of the Deputy Chancellor, New York City Board of Education, January 1977.

handicapped only after change has been mandated by court decisions and new laws.*

Special education is now one of the liveliest areas of school law. In recent years, a great many court cases have been filed on behalf of handicapped children throughout the country. The legal issues have ranged from "due process" requirements in making special education placements to the "right to education" itself.

The New York State Commissioner of Education's decision in the matter of Riley Reid is indicative of the kind of pressure brought to bear on local school districts. This decision, promulgated in 1973, mandated the immediate and appropriate placement of all handicapped children previously excluded from our school system's special education program. As a result of the Riley Reid decision, there have been significant changes and expansion in the school system's Division of Special Education and Pupil Personnel Services (DSEPPS). Since 1973, for example, the number of handicapped children served by DSEPPS has increased by more than twenty-five percent.

In addition to the requirements imposed by the Riley Reid decision, the New York City Board of Education is now subject to new state and federal statutes governing the conduct of special education. The "Giuffreda Bill," recently enacted by the New York State Legislature, not only guarantees that all handicapped children under the age of twenty-one have a right to

*In all fairness to public school officials, it should be pointed out that notions of what constitutes "equal protection" in education have been in a state of legal flux during the past twenty-five years. If school systems are to be blamed for anything, it must be shortsightedness--a characteristic, alas, of most large bureaucracies governed by tradition, rules, and other forms of institutional inertia.

public education, but also provides detailed assurances regarding their due process rights. In part, this legislative action was a response to the federal government's "Education for All Handicapped Children Act" (1975). This federal statute specifies a new set of standards and requirements which may prove to be the most effective tool yet in compelling public school systems to provide handicapped students with equal educational opportunities.

Given the rapid increase in our special education enrollment, coming as it does during a period of drastic fiscal retrenchment, questions of law are clearly of paramount importance. The problem is that court decisions have been coming so fast and furiously, attended also by new statutes and regulations, that our school system has no ready reference regarding what the law currently requires. This study was conducted to fill that gap.

Hopefully this document will be useful as a kind of handbook for staff throughout the school system. Readers are advised, however, that the information contained herein is by no means definitive. Even aside from the fact that legal analysis is always somewhat speculative, one should understand that special education "law" is in a great state of flux.* Hardly a month goes by that legal requirements are not changed in some significant way.

And changing though they may be, the laws must still be followed scrupulously. The real purpose of this document is not so much to capture and fix the status of the law at a given point in time, but rather to discern

*The status of case law discussed in this report is current to September 1976. The statutes and regulations summarized are current to December 1976.

important legal trends. Insofar as the document achieves this purpose, it should aid our school system's decisionmakers (teachers, the entire DSEPPS staff, administrators, and board members) in developing policies and procedures which continue to assure equal educational opportunities for handicapped children.

* * * * *

In November 1975, members of my staff completed a report entitled "Strengthening Business Management in the Division of Special Education and Pupil Personnel Services." This operations improvement project was initiated in response to management problems stemming from the recent rapid growth in our special education program. During our review of DSEPPS operations, we were confronted with a number of significant issues related to the testing, classification, and placement of handicapped children. However, since these issues were not directly within the scope of a management study, they were not discussed per se in our report.

Legal issues related to the classification of handicapped children emerged once again in connection with research conducted to support our role as plaintiff-intervenor in the case of Levittown v. Nyquist -- a lawsuit challenging the discriminatory payment formula of New York State's aid to education statute. One of our allegations in this lawsuit concerns the high cost of educating handicapped children and the inadequate reimbursement we receive from the state. While calculating special education costs in preparation for our testimony, it also became necessary to review

legal requirements (vis-a-vis the handicapped) mandated by the courts and established by state and federal statutes. The present study grew out of our review of the aforementioned legal requirements.

I would like to thank DSEPPS Executive Director Helen Feulner, who testified on our behalf in the state aid lawsuit, and DSEPPS executive staff members Donald Eisenberg, Howard Goldstein, Bernard Warshavsky, Evelyn Zwicker, and Grace Cavanaugh for their cooperation and assistance while this study was being conducted. In addition, Assistant Superintendent Helene M. Lloyd and Fern Lapidus deserve special thanks for their time spent reviewing and improving this document.

The report was prepared by Susan G. Smith under my supervision. Richard Guttenberg, a senior analyst on our staff, worked closely with Susan and provided editorial assistance throughout the report's preparation. In terms of the basic legal research which went into this report, a good deal of helpful advice and consultation was offered by Leigh Marriner, Beth Swartz and Felix Baxter. Susan, Richard, Leigh, Beth, and Felix are all members of our Educational Policy Analysis Unit. I must also thank Charlotte Johnson, Carol Young, Madeline Romero and Patricia French for the long hours spent preparing the manuscript.

BERNARD R. GIFFORD
Deputy Chancellor

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SECTION I

OVERVIEW OF THE REPORT

The Supreme Court decision in Brown v. Board of Education* cleared the way for judicial review and public scrutiny of education issues previously considered to be the sole province of school officials. In 1954 Brown emphasized the importance of education to citizens of a democracy, and decided that where a state undertook to provide public education, it had to guarantee equal educational opportunities to all residents:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

In recent years a series of lawsuits have focused on establishing for handicapped children the same access to free public education which exists under the Brown precedents, for "normal" children throughout the country. While legal intervention cannot insure sound school administration or effective teaching, it has, to date, been the most effective means of securing

*347 U.S. 483 (1954).
**Ibid

change in the education of handicapped children.* Of the fifty-six school aged children in the United States, an estimated seven million suffer from mental, physical, emotional or special learning problems. Approximately one million have been and continue to be totally excluded from public educational facilities,** despite the fact that "right to education"*** suits have been filed in some twenty-eight states.

A landmark case among those court decisions which sought to establish the handicapped person's right to education and placement in an appropriate program according to rational classification procedures was Hobson v. Hansen.**** In 1967 this federal court case addressed the question of the constitutional propriety of school classification practices and led the way for future litigation concerning IQ testing and the alleged misclassification of certain handicapped children.

Other federal judicial decisions, following the precedents established in 1971-1972 by Pennsylvania Association of Retarded Children (PARC)***** v. Commonwealth of Pennsylvania and Mills v. Board of Education****** have successfully

*David L. Kirp et al, "Legal Mandates and Organizational Change," Nicholas Hobbs, ed., Issues in the Classification of Handicapped Children, p. 320, Volume II, Jossey-Bass Press, San Francisco, 1975. It is too early to assess the effectiveness of the recently enacted federal legislation on education of the handicapped.

**Frederick J. Weintraub and Alan Abeson, "New Education Policies for the Handicapped: The Quiet Revolution," Phi Delta Kappan, p. 526, April 1974.

***"Right to education" should be construed as the right to equal educational opportunity which Brown found to exist under the Fifth and Fourteenth Amendment guarantees of equal protection. There is no fundamental right to receive an education; however, when a state undertakes to provide free public education, it must provide it on an equal basis for all residents.

****269 F.Supp. 401 (1967).

*****334 F.Supp. 1257 (E.D. Pa., 1971) and 343 F.Supp. 279 (E.D. Pa., 1972). See discussion infra.

******Civ. no. 1939-71 (D.D., 1972). See discussion infra.

challenged the exclusion of handicapped children from public education. These cases also have mandated procedural safeguards for the evaluation and placement of handicapped children.

It must be noted that the cases dealing with handicapped children have not built upon one another in simple progressions, while case law in other fields, such as labor, has developed systematically. The reason for the difference between education and labor rests at least in part on national policy. Since the early twentieth century, labor law has been a matter of federal legislation, enforcement and interest. Despite Brown, educational law and policy have remained a matter of local rather than national concern. A rural school district in which only two or three handicapped children reside clearly cannot be expected to establish a network of special schools such as those which exist in New York City where there are over 40,000 full-time handicapped pupils. Therefore, while Brown, and more recent cases which dealt with the handicapped followed principles enunciated in the Federal Constitution (particularly under the Fourteenth Amendment which guarantees equal protection of the law and due process),* their implementation has varied from school district to school district. The case law produced from one state court proceeding does not necessarily build on that rendered in another state.

Nevertheless, significant changes in state and local evaluation and placement procedures have been made, in part, as a result of case law trends.

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*". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law...," Fourteenth Amendment, United States Constitution.

Massachusetts' Chapter 766, the most progressive state statute for the education of the handicapped, was passed by the Massachusetts State Legislature in 1972. The formulation and passage of this law was partly a result of the still pending suit, Stewart v. Phillips.* The suit challenged the classification of black or low income pupils as mentally retarded. Plaintiffs alleged that evaluation and placement procedures were incomplete, improperly evaluated, and not rationally related to classification decisions.

"Right to education" cases, brought throughout the United States, served as a primary impetus for a significant new piece of federal legislation: the Education for All Handicapped Children Act of 1975. This act, when implemented, will guarantee full educational opportunities and detailed procedural safeguards to assure the provision of appropriate services to handicapped pupils.

Since the 1967 Hobson decision, federal courts around the country have focused on education of the handicapped. These courts have, on numerous occasions, found infringement of the constitutional rights of handicapped children.** Many of the court decisions in this area have focused on exclusion from education or special education assignment and the harm which these practices can cause: educational ineffectiveness and stigmatization of excluded children or students assigned to special classes. Depriving these children of normal classroom experience deprives them of their right to have an educational opportunity equal to that of "normal" children.

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*Civ. No. 70-119-F (D.C. Mass., September 14, 1970).
**See discussion infra.

Other court decisions have focused on racial over-representation and racial isolation.* The courts have stated that a disproportionate number of minority children in special education classes may constitute violation of the equal protection clause. This racial isolation is serious enough to require a demonstration that classification is not based on racial grounds and that such sorting of pupils outweighs the specific harm of isolation.

Yet other court actions have involved violations of the due process and equal protection clauses of the Fourteenth Amendment. Under scrutiny in these court decisions were procedures whereby children were evaluated before their educational status was changed to the "special" one which make them subject to possible stigmatization.

This report includes a brief review of classification and labeling issues, and then examines, in detail, case law trends focused in three areas: 1) exclusion and special education assignment; 2) IQ testing, misclassification and racial over-representation; 3) due process requirements in making special education placements. In addition to identifying trends, the report points out the relevance of court decisions to educational policy in New York City. Recommendations for change in New York City policies are included. Abstracts of cases cited in this report appear in Appendix A. Other appendices include basic legal documents pertinent to the evaluation, classification, and placement of handicapped children.

*Ibid.

SECTION II

CLASSIFICATION AND LABELING

> We do not concur with sentiments, widely expressed, that classification of exceptional children should be done away with. Although we understand that some people advocate the elimination of classification in order to get rid of its harmful effects, their proposed solution oversimplifies the problem. Classification and labeling are essential to human communication and problem solving; without categories and concept designators, all complex communicating and thinking stop. We shall address abuses in classification and labeling, but we do not wish to encourage the belief that abuses can be remedied by not classifying. In fact, we shall argue for more precise categories and for more discriminating ways of describing children in order to plan appropriate programs for them, and we shall advocate safeguards to decrease the deleterious effects of classification procedures that can, in fact, have many beneficial outcomes.
>
> Nicholas Hobbs, The Futures of Children*

Historically, school categorization developed out of the need to provide special instruction, particularly in English, to the hundreds of thousands of immigrants from eastern and southern Europe. The so-called "opportunity classes" for this element of the urban population were among the first special education classes. Educators in America adopted principles of the organizational structure and division of labor common to growing business corporations. As the need for specific skills in industry grew, so did the categorization of students in order to prepare them for their future work. Curricula were adapted to suit the abilities as well as the life goals of each student. The standardized

*Jossey-Bass Press, San Francisco, p. 5, 1975.

aptitude and intelligence tests, introduced in the twentieth century, provided a seemingly rational method for categorizing students. Since the 1920's state and federal laws have encouraged the use of classification by American educators.*

Special education classes are a recent phenomenon. The first New York City public school programs for the handicapped were established in 1906. By 1934 the Board of Education considered special education to be one of the most innovative and progressive aspects of the school system.

Special schools, special classes and homebound instruction programs were established to meet the needs of mentally, physically and "morally" handicapped children. Special education programs included ungraded classes for the retarded, special schools and classes for the physically handicapped and special "schools of opportunity for behavior problem boys who are unable to make suitable adjustment in the traditional school."** The impetus behind the establishment of these service programs in New York City was the recognition of individual differences in learning ability and also the belief that handicapped pupils could not compete on the same basis with normal children.***

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*David L. Kirp, "School Classification, Public Policy and the Courts," Harvard Educational Review, pp. 1-2, Volume 44, No. 1, February 1974.

**"Handicapped and Underprivileged Children - Special School and Special Care - Instruction in Homes and Hospitals," Annual Report of Associate Superintendent Margaret J. McCoovey to Harold G. Campbell, Superintendent of School, School Year 1933-34, p. 6.

***Ibid, p. 3.

In her report for school year 1933-34 Associate Superintendent Margaret J. McCoovey stated that special education was established "to give to every child an equal chance with his brother, and a chance to become a self-sustaining member of society."* According to this report, parents no longer regarded special education as a stigma. The categorization of handicapped children focused attention on their educational needs and strengthened appeals for financial support.

The Bureau of Child Guidance (BCG)** was directed to promoting "healthy growth," "strong character" and the integration of a "healthy personality." The Bureau staff conducted psychological tests and provided direct treatment for children. The Evaluation of each child usually included the study of environmental factors such as relationships in the home and adjustment in school, as well as a report on his or her physical condition.

Over 40,000 students are now enrolled in special education programs in the New York City public schools.*** Special education includes special schools, separate classes, and resource and intinerant services for students with mental retardation, physical impediments, psychological disturbances or multiple handicapping conditions. Some handicaps are so severe that provision for a special kind of education is obviously necessary.

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*Ibid, p. 5.

**BCG currently provides evaluation and diagnostic services primarily to children suspected of being mentally retarded or emotionally disturbed. The Bureau also provides social work, psychological and psychiatric clinical services to handicapped and non-handicapped pupils. While BCG focuses on mentally retarded and emotionally disturbed students, the Evaluation and Placement Unit (E&P) evaluates and diagnoses children with other potential handicaps.

***See Table I.

The mildly handicapped, for example the educable mentally retarded (EMR), non-severely emotionally handicapped (EH) and many neurologically impaired (NI) have disabilities which are more difficult to diagnose and more difficult to treat appropriately.*

TABLE I

SPECIAL EDUCATION ENROLLMENT 1975-1976

HANDICAP PROGRAM	FULL-TIME PUPILS	PUPILS RECEIVING RESOURCE AND ITINERANT SERVICES
PHYSICALLY HANDICAPPED	10,679	--
RETARDED MENTAL DEVELOPMENT	12,656	--
SOCIALLY MALADJUSTED AND EMOTIONALLY DISTURBED	13,353	35
HEARING HANDICAPPED	1,490	719
VISUALLY HANDICAPPED	228	649
SPEECH HANDICAPPED	--	57,553
NEUROLOGICALLY IMPAIRED EMOTIONALLY HANDICAPPED	660	--
MULTIPLY HANDICAPPED	220	--
OTHER	1,185	--
TOTAL	40,471	58,956

NOTE: Peak enrollment figures are used here. Pupils in non-public schools are not included.

*Dunn, "Special Education for the Mildly Retarded: Is Much of it Justifiable?" E. Rubin et al., Emotionally Handicapped Children and the Elementary School, pp. 3132-3134, 1966. R. Jones ed., Problems and Issues in the Education of Exceptional Children, p. 382, 1971.

Students who fall outside the so-called "normal" range in school administered tests are treated as "special" or "exceptional." As Kirp pointed out:

> Such students by no means resemble one another. They may have intellectual, physical or emotional handicaps; they may not speak English as their native language; they may simply be hungry or unhappy with their particular school situation ... Yet the school, in part because its resources are scarce, cannot tailor individual needs. Instead it develops classifications which attempt to reconcile the variations among exceptional children with limitations of school resources.*

In recent years public concern by parents' groups and other advocates of equal educational opportunity has focused on the use of labels or handicap categories to sort children. There has been a general dissatisfaction with labeling, with the interest groups alleging that the services provided for handicapped children are inadequate or inappropriate.

STIGMATIZATION AND HARM IN SPECIAL EDUCATION PLACEMENT

Traditional special education placement frequently operates as a form of ability grouping. According to many authorities, this method of sorting students has a damaging effect on "slow learning" students, and restricts these students' exposure to diversity. Such placement stigmatizes "slow learning" group students as inferior.** Findley and Bryan in their study of ability grouping determined that this stigma was more detrimental than low achievement in heterogenous groups. Locked into low groups, students with already unfavorable self concepts will likely

*David L. Kirp, pp. 8-9.
**Merle McClung, "School Classification: Some Legal Approaches to Labels," Inequality in Education, pp. 26-27, No. 14, July 1973.

develop a deeper sense of inferiority.* It becomes extremely difficult for a low group or special education child to move back into the mainstream. In a number of school districts that were surveyed by New York's Fleischman Commission less than 10 percent of the children placed in special classes ever returned to regular programs.**

Since the probability of stigmatization and reduced sense of self worth appears to be so high, traditional classification schemes should bear close scrutiny. David Kirp has scrutinized traditional labeling schemes and has concluded:

> The school's inclination to cope with a particular learning or social problem by isolating those who share that problem reinforces children's sense of stigma. Children perceive, all too well what the school's label means.***

Labels also limit interaction with other than handicapped children and may narrow societal and vocational opportunities. The school curriculum designed for certain handicapped children for example the mentally retarded, is such that assignment to a slow special class may become a self-fulfilling prophecy.**** The labeled child becomes less and less capable of functioning in the mainstream or higher ability classes. Teachers expect less and the student performs accordingly. A child may fall further behind each year. This exacerbates

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*James Gallagher, "The Special Education Contract for Mildly Handicapped Children," Exceptional Children 38, pp. 527-29, March 1972 and data collected informally by the Office of Education.

**The Report of the New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education offers as an explanation the fact that reevaluation of students was very infrequent. In New York City in 1969-1970, 1,603 retarded children had not been evaluated in over three years and 2,028 had not been evaluated in over five years. The situation in New York has, however, been improved dramatically since then. All handicapped children must be formally reevaluated every three years in accordance with state law.

***David L. Kirp. p. 22.

****Ibid, p. 23

an already heightened sense of inferiority. Certain labels (e.g., mentally retarded) may stick for life and may adversely affect a student's ability to function outside the school environment.*

Recent studies have shown that students may not benefit from special class placement.** Special programs for the severely handicapped (e.g., the profoundly retarded) have succeeded in achieving educational goals,*** but programs for the mildly handicapped (e.g., the educable mentally retarded, the mildly emotionally disturbed and learning disabled) may not benefit their students.**** Furthermore, educators have very limited knowledge regarding the milder disabilities and the appropriate prescriptions for learning.

RACIAL OVER-REPRESENTATION AND CAUSAL FACTORS

What the research has shown is that the traditional classification separates students along racial and class lines and that this form of de facto segregation may cause injury to children from minority groups. Over-representation of minority groups threatens the goal of school integration, may limit educational opportunities and certainly calls into question the basis for developing such a classification system.

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*"Putting the Child in its Place," unpublished paper, Harvard Center for Law and Education, 1972 and Robert Edgerton, The Cloak of Competence: Stigma in the Lives of the Mentally Retarded, University of California Press, Berkeley, California, 1967.

**Reginold Jones, Labels and Stigma in Special Education," Exceptional Children, 38, p. 561, March 1972.

***Samuel Kirk, "Research in Education," Harvey Stevens and Rick Heber, eds., Mental Retardation: A Review of Research, University of Chicago Press, Chicago, 1964.

****G. Orville Johnson, Special Education for the Mentally Handicapped - Paradox," Exceptional Children, 29, pp. 62-66, October 1962.

> Classificatory schemes allow for control and efficiency in school and classroom administration and serve as justification for continued discrimination against black children. New labels for black children serve as substitutes for and as statements of old-fashioned prejudice.*

L. Wendell Rivers maintains that for black children the two principal causes of negative labeling are racism and poverty.** This latter cause - poverty - has recently been the subject of intensive study. Thomas S. Langner, Professor of Epidemiology at Columbia University's School of Public Health, has studied the relationship between poverty-caused stress in the environment and impairment in children.*** Impairment was defined to include factors related to school learning: reading difficulty, difficulty remembering, poor concentration, poor speech pattern and mixing up of words. In a recent research project Dr. Langner included a cross section of 1,034 children aged eight to ten in Manhattan households, and 1,000 similar welfare children. Twenty-three percent of the welfare sample tested severely or moderately impaired (the equivalent of needing in-patient or out-patient medical or psychiatric care), and only 13.5 percent of the cross section sample were similarly categorized. The welfare population was shown to be subjected to more environmental stress than non-welfare. These stresses in the environment produced a strain in poor children whose efforts to adapt were never totally satisfactory.

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*L. Wendell Rivers et al., "Mosaic of Labels for Black Children," Nicholas Hobbs, ed., Issues ..., p. 214, Volume II.

**Ibid.

***Thomas Langer et al (ed.), "Differences in the Behavior of Welfare and Non-Welfare Children in Relation to Parental Characteristics, "Archives of the Behavorial Sciences," Number 48, Clinical Psychology Publishing Company, Brandon, Vermont, October 1975 and Langner et al, The Epidemiology of Mental Disorder in Children: Implications for Community Psychiatry, Columbia University, School of Public Health, Division of Epidemiology, New York, New York; presented to the Kittay Scientific Foundation, the Fourth International Symposium, "A Critical Appraisal of Community Psychiatry," March 29th 1976.

Research in the field of mental (or intellectual) retardation reaches similar conclusions regarding the level of poverty and related impairment. Steven A. Richardson, Professor of Pediatrics and Community Health at Yeshiva University's Albert Einstein College of Medicine, conducted a research project in Aberdeen, Scotland which examined socio-economic conditions as they influence mental retardation.* Dr. Richardson's study and numerous others in the United States found that there was a greater risk of intellectual impairment or mild retardation if a child came from an impoverished family. While severe retardation was found to be distributed randomly across the socio-economic scale, the incidence of mild retardation (e.g. of the learning disabled or educable mentally retarded) was directly related to conditions of poverty.

ALTERNATIVES TO TRADITIONAL CLASSIFICATION

Possible alternatives to the traditional classification schemes have been devised. For instance, James J. Gallagher and his associates have studied classification and labeling across the country and found that forty-two states use some form of labeling or categorization as a basis of funding local programs for handicapped or exceptional children.** While most states use the conventional handicap categories (mentally retarded, blind, deaf, emotionally disturbed), eleven of the forty-two classify children more broadly as "handicapped" or "children in need of special assistance." Most special education directors surveyed by Gallagher feared a cutback in program funding if traditional labels were

*H.G. Birch, S.A. Richardson et al, Mental Subnormality in the Community, Williams and Wilkins, 1970.

**Gallagher et al., "Funding Patterns and Labeling," Nicholas Hobbs, ed., Issues ..., Volume II.

dropped. But they did reach agreement on a possible solution: "The solution most acceptable . . . was to base the reimbursement or support formula for the local school districts on the necessary services to meet the educational needs of the handicapped."

This alternative was implemented by the State of Minnesota, which since 1957 has based funding on service assistance needed rather than on handicap labels:

> In 1957, the support in terms of child "categories" was recognized as being dysfunctional and a new plan was instituted. Instead of dispensing funds according to the labels that were attached to children, the state began to pay two thirds of the salary costs of the personnel who were needed to serve the children with special needs. Thus, the attention was shifted from the child's handicap to the quality of the personnel and the programs that fulfilled his educational needs. The communities receiving the funds were able to develop more and better options to serve the children involved.
>
> Under this arrangement, the state could easily trace its funds to trained personnel who were employed to conduct specialized programs; it could make certain that children with handicaps were the ultimate benefactors of the aid; and it could check on the quality and suitability of the educational services provided to the children.
>
> School districts were no longer constrained; it became possible for them to institute a variety of administrative arrangements to improve the programs for exceptional children. In other words, it became possible for the school systems of Minnesota to break out what might be called the "two-box" theory of special education; that is, the dichotomy of regular classes and special classes, in which children are categorized and allocated according to rigid criteria and related financial formulas.

> In Minnesota, we have moved a long way in removing the tendencies to categorize and label children. They can be served educationally in specialized ways as needed, but on the basis of individual studies and individualized plans without the crippling effects of categorical boundaries.*

The state of Massachusetts adopted a similar approach to classification in 1972 and other states such as Tennessee and California have developed methods to replace conventional labels with precise definitions of service needs.**

Clearly the traditional classification systems and labels are too limiting and describe a child's education-related problems in a negative way. Traditional labeling yields very little information concerning learning and service needs. There has been an emphasis on pathology rather than an appreciation of a child's assets or strengths which can provide a basis for an "affirmative program" in the interest of the child.***

High quality program planning to better meet the needs of exceptional children would require a profile of the child's assets and liabilities. It should include a description of the child's physical attributes, and medical, psychological and educational evaluative data. The plan should not only include what a child can and cannot do, but also what he can be taught or expected to learn to do. Evaluations should make use of all the people important within the child's world: "In effect, a profile of assets and liabilities describes the transactions between the child and

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*Maynard Reynolds, undated report, pp. 10-11. See Nicholas Hobbs, The Futures of Children, Jossey - Bass Press, San Francisco pp. 100-102, 1975.

**Nicholas Hobbs, The Futures of Children, p. 100.

***Ibid, P. 104.

people significant in his life, always in particular settings and at particular times."*

The profile of the child should form the basis of an individual plan with specific treatment objectives and time limits for achieving them. In The Futures of Children Nicholas Hobbs describes taking an "ecological approach" to a child's problems and needs. The child is not the sole focus of the needs assessment and planning: ". . .the problem is seen as residing in an ecological system of which the child is an integral part."** Attention should be paid to the exchanges between the child and his or her environment. In this approach to evaluation and planning the role of the parent is seen as crucial. Hobbs states that the basic assumption underlying education and rehabilitation is "that handicapped persons will progress toward normalcy. Provision must be made then, for upward mobility toward less restrictive settings." These settings have been described by M. C. Reynolds of Minnesota as the "Cascade System:"***

Regular Classroom
Regular Classroom plus Specialist Consultation
Regular Classroom plus Itinerant Teacher
Regular Classroom plus a Resource Room
Part-time Special Class
Full-time Special Class
Special Day School
Residential School
Hospital

*Ibid, p. 105 and also R.P. Cantrell, and M.L. Cantrell, "A Taxonomic Investigation of Children's Problems and Correlated Investigation Strategies: An Empirical Approach to Classification," Working Paper Prevention-Intervention Project, Tennesee State Dept. of Mental Health, Nashville, 1974.

**Nicholas Hobbs, The Futures of Children, pp. 113-114.

***M.C. Reynolds, "Framework for Considering Some Issues in Special Education," Exceptional Children, 28, pp. 367-270, 1962.

Following Hobbs, the child should be placed in the so called "least restrictive alternative" after having been classified according to his learning needs. An educational prescription or plan may take the form of a contract satisfying three parties - parent, child and school. At minimum, the plan should reflect an assessment of the "total" child as he functions in his environment, and the specific objectives to be reached along with timetables for the achievement of these objectives. Hobbs sees the educational services contract as "a logical extension and a key element of the right to education and the due process directives being delivered by courts and legislatures."*

*Nicholas Hobbs, The Futures of Children, p. 288.

SECTION III

EXCLUSION AND SPECIAL EDUCATION ASSIGNMENT

Although the Rodriguez decision of 1973 ruled out consideration of education as a fundamental constitutional right,* it recognized the fundamental importance of education. Education may be considered a fundamental interest if "the system fails to provide each child with the opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and full participation in the political process."** Exclusion from school and special education placement are likely to warrant judicial inquiry. Exclusion or total denial of educational opportunity is a primary target of inquiry.

> Exclusion represents the complete denial of a service. Even if education plays only a marginal role in shaping opportunities, denial of education is not a trivial matter ... exclusion based on a judgment of ineducability is likely to cause irreversible harm to both the child's achievement and psyche. Thus, even without a showing of actual injury, courts can hold that exclusion from school is unconstitutional as a denial of equal protection.***

The seminal "right to education" case was PARC v. Pennsylvania.**** Decided in 1971, this suit was brought against the State of Pennsylvania and various public officials by fourteen mentally retarded children representing the class of all retarded children in the state. The plaintiffs challenged the constitutionality and enforcement of certain Pennsylvania statutes which permitted the exclusion of retarded children from public education. The state had undertaken, however, to grant "normal"

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*San Antonio Independent School District v. Rodriguez, 93 S.CT. 1278 (1973).

**Merle McClung, "School Classification: Some Legal Approaches to Labels," Inequality in Education, July 1973.

***David L. Kirp, p. 27.

****334 F.Supp. 1257 (E.D. Pa., 1971) and 343 F.Supp. 279 (E.D. Pa., (1972).

children between the ages of six and twenty-one a free public education. Expert testimony was presented in an effort to disprove the defendants' claim that retarded children were ineducable:

> ... the earlier such education and training begins, the more thoroughly and more efficiently a mentally retarded person will benefit from it; and whether early or not ... a mentally retarded person can benefit at any point in his life and development from a program of education and training.

The court decided that the state was required to provide an education "appropriate to the child's capacity" whether or not the child was mentally retarded. The most desirable placement was held to be that most like the one provided to non-handicapped children, a principle now referred to as the "least restrictive alternative." The controversy was resolved in a consent agreement which provided for the public education of all retarded children. This stipulation also guaranteed proper notice to parents and the opportunity for a hearing prior to the special class placement of their children. Two court masters were appointed to oversee implementation of the agreement.

Hence, PARC laid a foundation for deciding cases involving exclusion of retarded children from public education. First, it permitted the retarded children to bring a class action suit, to present expert testimony on their own behalf and to demand inclusion in public schools;* and secondly the court's decision recognized deprivation of constitutional rights and mandated the inclusion of retarded children in public educational programs.

*If retarded children had been relegated to individual suits in order to guarantee their rights, many parents would not have sued at all due to financial inability; and those who did sue, could have demonstrated only isolated instances of deprivation of rights.

In the Mills v. Board of Education* case decided in 1972, seven school-excluded children filed a class action suit against the District of Columbia Board of Education, the Department of Human Resources and the Mayor. The plaintiff children represented the following handicaps: brain damage, hyperactive behavior, epilepsy and mental retardation, and mental retardation with an orthopedic handicap. Plaintiffs alleged that they could benefit from educational services, and that they had been excluded from public schools with no provision for alternative educational placement or periodic review of their exclusion.

Judge Joseph Waddy declared that since other than handicapped children were given free public education, any handicapped or exceptional child had a right granted under the equal protection guarantee of the Fifth Amendment to an opportunity to partake of an equal, publicly supported education. The court ruled that the Board of Education was required to provide whatever specialized instruction was necessary to benefit these children. By failing to provide handicapped children with publicly supported specialized instruction the Board violated District of Columbia statutes, its own regulations and the right to equal protection under the law. The Judge also stated that a hearing prior to placement and a periodic review of placement procedures were necessary to guarantee the plaintiff class their rights to due process and equal protection of the law. The defendants had stated that it would be impossible to grant plaintiffs the relief they requested unless:

*348 F.Supp. 866 (D.D.C., 1972).

(a) The Congress of the United States appropriates millions of dollars to improve special education services in the District of Columbia; or

(b) These defendants divert millions of dollars from funds already specifically appropriated for other educational services in order to improve special education services. These defendants suggest that to do so would violate an Act of Congress and would be inequitable to children outside the alleged plaintiff class.*

With respect to the funding of special education programs for all handicapped children, the court ruled that:

> The District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system, then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom.

Therefore, Mills extended the PARC equal protection and due process-based principles to cover all handicapped children, rather than just retarded children.

The lack of funds defense, probably raised by the Board of Education in an effort to differentiate the facts of this case from PARC, was stricken by a judiciary so adamant in its support of the plaintiffs that it granted summary judgment and thus decided the cases without the usual legal formalities. Judge Waddy's opinion exemplified a policy which the District of Columbia's district and circuit courts developed for education through litigation in the cases of Bolling v. Sharpe** and Hobson v. Hansen (supra).

*"The Defense," Mills v. Board of Education of the District of Columbia.
**347 U.S. 497 (1954). Bolling v. Sharpe applied the Brown decision to the District of Columbia public schools.

Other districts and circuits which were not faced with this history of education discrimination suits would not necessarily make a decision as far-reaching as Mills.

Challenges to special education placement present slightly different constitutional problems from challenges to the total exclusion of handicapped children from public education. The classification of pupils and special class placement have historical precedents, and represent an attempt by school districts to provide an educational program suitable to the needs of the individual child. David Kirp has stated, however, that special education placement can be more "onerous" than tracking, since the word "special" connotes a degree of abnormality which encourages stigmatization.* The "special" placement of mildly handicapped students often isolates them from their peers and reduces their chance of returning to the mainstream. Special education programs for the mildly handicapped may also present watered-down curricula. Kirp concluded:

> These demonstrable harms - stigmatization, diluted educational offerings, and reduced life chances - suggest that special education placement for the mildly handicapped denies those individuals equal educational opportunity.
>
> A successful challenge to placement in inefficacious programs for the educable mentally retarded or mildly emotionally disturbed has a relatively modest and accomplishable goal: the effective integration of those students into the general life of the school.**

*David L. Kirp, p. 29.
**Ibid, pp. 29-30.

In 1973 the Rhode Island Society for Autistic Children brought a class action suit on behalf of the 14,000 handicapped children in Rhode Island school systems and in several state institutions.* The RISAC class included children who were not presently attending school, children in special classes or schools, and children in regular classes who were in need of special education. The plaintiffs alleged that the state had failed to provide an appropriate education for these children and had failed to establish procedural safeguards in handicap placement procedures. Plaintiffs further stated that the handicap classifications resulted in a self-fulfilling prophecy, and that handicapped children were stigmatized and harmed for life.

The case has been recessed until September 27, 1976 but a series of consent agreements were reached between the plaintiffs and the defendants. Further extending a principle established in PARC, the RISAC case has permitted the maintenance of a class action on behalf of all classes of handicapped children in the state, including those presently excluded from and presently attending public schools. Again following Mills and PARC, the RISAC agreements clearly aimed at guaranteeing equal protection and due process rights to handicapped children. The role of the parent in the classification process was extended, and for all institutionalized children an individual educational plan was required.

According to the stipulations, no child may be classified and placed as retarded unless he or she is found to be abnormal in adaptive behavior and to score below 70 on an individually administered IQ test. This test

*Rhode Island Society for Autistic Children, Civ. No. 5081 (D.C. R.I., January 1973).

must also be adjusted for socio-cultural bias and must be conducted in the child's home language.

Each local education agency must establish due process procedures to insure parents and children a fair hearing prior to any change in the educational status of the child. Parental permission is required for new and continued special education placement; and parents must be informed of all new requirements as stated in the consent agreements.

The State Education Commissioner has requested each district to develop a referral system for diagnostic evaluations and to design and establish a pre-school testing program. Special educational programs must be provided for all children aged 3 to 6 years who are identified by these screening tests. The Commissioner of Education must employ staff to coordinate and monitor these pre-school programs regardless of the availability of federal funding.

In 1975 a successful suit in Pennsylvania extended the PARC "right to education" principle for the mentally retarded to all handicapped children in Pennsylvania.* In Catherine D. v. Pittenger it was alleged that the plaintiff class had been or would be denied the opportunity to contest the appropriateness of a change in educational status or placement. The plaintiff maintained that inappropriate placement constituted a withholding of her right to educational opportunity commensurate with that enjoyed by non-handicapped children, and thus represented a denial of procedural due process and equal protection. The suit was settled when the Pennsylvania State Board of

*Catherine D. v. Pittenger, Civ. No. 74-2435 (E.D. Pa., June 1975).

Education adopted rules and regulations which entitled all exceptional children to appropriate and immediate placement:

> All handicapped school-aged persons identified shall be provided with an appropriate program of education and/or training including the right of a due process hearing for mentally retarded ... or due process procedures for other handicapped school-aged persons ... to determine the appropriateness of the classification and program.*

The regulations called for detailed due process procedures including provision for non-discriminatory testing: testing materials and procedures must be selected, administered, and interpreted so as not to be racially or culturally discriminatory. The regulations also stated that when the percentage of any racial or ethnic group placed in special education programs is significantly disproportionate to the distribution of such group in its district, the school district would be notified by the Department of Education. In order to continue the current placements, the burden of proof falls on the school district to determine that assignments are justifiable and that the disproportion is necessary to promote "a compelling educational interest" of the affected children.

Catherine D. broadened the PARC and Mills principles to the greatest degree practicable. The class of all handicapped children in Pennsylvania have been guaranteed that their Fourteenth Amendment due process and equal protection rights will be implemented through state adopted regulations. Future questions can only deal with the interpretation of these new regulations by courts and local school officials. The effect of the disposition of the case here is similar to that of Mills in the District of Columbia. It must

*Rules and Regulations, Rhode Island State Board of Education, Chapter 13, General Provisions, 13.11.

again be stressed that Pennsylvania and the District of Columbia may establish their own precedents in the classification and placement of handicapped children which need not be followed by other states or cities. The repeated suits within Pennsylvania, like those in the District of Columbia, influenced the state's decision to take a position in favor of the handicapped plaintiffs.

A similar suit, Mattie T. v. Johnston* was initiated in Mississippi on April 25, 1975. Twenty-six black, handicapped children brought this class action on behalf of all similarly situated children in the State of Mississippi. The plaintiffs' allegation included:

- failure to provide educational services to handicapped children excluded from school or placed in regular programs
- provision of educational services to the handicapped in special classes which isolate children and fail to meet their educational needs
- failure to provide procedural safeguards to insure appropriate pupil placement
- use of racially discriminatory tests and evaluation procedures for placement decisions.

Relief is sought from the Mississippi State Department of Education and officials of six local school districts under

- Section 504 of the Rehabilitation Act of 1973
- Education for All Handicapped Children Act, Part B
- Title I of the Elementary and Secondary Education Act of 1965
- Fourteenth Amendment of the United States Constitution.

*Civ. No. DC-75-31-5 (N.D. Miss., April 1975).

The parties are currently negotiating a consent agreement. This is the first major suit which seeks relief under the new federal Education for All Handicapped Children Act.

Other equal protection suits regarding placement of handicapped children in public schools have been supported by attorney generals in New Mexico, Arkansas,* and elsewhere; state legislatures in Tennessee, Massachusetts, Wisconsin,** and elsewhere; and at least one state commissioner of education, Ewald Nyquist of New York.***

Nine children and the New York Association for Brain Injured Children initiated a proceeding before the New York State Education Commissioner on behalf of all handicapped children in the City School District of New York. In Riley Reid the petitioners alleged that the state statutory rights of their class members were being violated and that the petitioners were suffering irreparable harm due to the city's failure to provide them with an appropriate education. The allegations included:

- Failure to place a handicapped child or failure to find a suitable placement.
- The unavailability of placements in violation of the mandate that education services, facilities and/or programs must be provided for handicapped children.
- Suspension of handicapped children from classes without adequate notice or availability of alternative educational opportunities.

*Arkansas Attorney General's Opinion, 73-187 (Sept. 7, 1973); New Mexico Attorney General's Opinion, MNAG 71-125 (1971).

**Tennessee Acts, Ch. 389 (1972); Massachusetts Statutes, Ch. 766 (1972); Wisconsin Statutes, Ch. 89 (1973).

***Riley Reid v. Board of Education of the City of New York, Administrative Procedure before the New York State Commissioner of Education, No. 8742, November, 1973. See also Frederick J. Weintraub and Alan Abeson, "New Education Policies for the Handicapped: The Quiet Revolution."

Investigations by the State Education Department verified that many handicapped children had not been placed in suitable programs and that the Board of Education had failed to make space and facilities available for such programs. The Education Department also found that children had been expelled from school for medical reasons which did not preclude enrollment in an alternative education program, and that some children were suspended from classes with no provision for alternative educational services. Furthermore, children placed on home instruction were not receiving the required number of hours instruction in accordance with the Commissioner's regulations.

The Commissioner issued a series of orders in 1973,* the most far reaching of which was an affirmation of the "right to education" for all handicapped children:

> It is further ordered that all students who have been diagnosed as handicapped be placed immediately in appropriate public school classes or, if public school classes are not available, in private schools under contract ...

Since 1972 the full-time special education population in the New York City public schools grew from 30,268 to 40,471.** Under pressure of the administrative order the Board of Education has been rapidly expanding programs. The Board of Education must seek to include all children who remain unserved before further litigation is commenced, this time under the new federal Education for All Handicapped Children Act. In a suit by

*See Appendix B.
**Peak enrollment 1975-1976. See Table 2.

Table 2

SPECIAL EDUCATION PEAK ENROLLMENT HISTORY

	1970-71	1971-72	1972-73	1973-74	1974-75	1975-76
PHYSICALLY HANDICAPPED	7,950	8,603	9,111	9,869	11,240	10,679
RETARDED MENTAL DEVELOPMENT	12,833	12,856	12,903	13,169	12,721	12,656
SOCIALLY MALADJUSTED AND EMOTIONALLY DISTURBED	5,592	6,589	6,900	8,629	12,598	13,353
HEARING HANDICAPPED	780	816	845	878	1,388	1,490
NEUROLOGICALLY IMPAIRED EMOTIONALLY HANDICAPPED	0	0	0	0	0	660
MULTIPLE HANDICAPPED	0	125	127	128	143	220
OTHER	0	0	0	260	779	1,185
TOTAL	27,865	29,371	30,268	33,170	39,553	40,471
% INCREASE EACH YEAR		5.4%	3.1%	9.6%	19.2%	2.3%

Note: Peak enrollment figures are used here. The peak month for special education usually occurs in May of each year. Pupils in non-public schools are not included.

excluded or misclassified students, the burden of proof would be on the Board of Education to demonstrate that it has not denied the children's constitutional or Federal statutory rights. This burden has been traditionally construed by courts, since PARC and Mills, to be very heavy, and therefore, the various boards of education across the United States have had a very poor record of winning suits once they have been brought into the court.

SECTION IV

IQ TESTING, MISCLASSIFICATION AND RACIAL OVER-REPRESENTATION

In recent years the use of IQ tests for the purposes of classifying or sorting students into ability or special education groupings has been the subject of much controversy. IQ tests are considered to be reasonable predictors of school success. They may measure the adaptability of a child to the school's expectations.* But treating intelligence in aggregate terms, as a standardized test may do, is over-simplifying the notion of intelligence. The growth patterns of children can be uneven. A student is apt to be more competent in some things than he or she is at others. Intelligence measurement should include an evaluation of both strengths and weaknesses, in adaptive behavior** as well as performance on standardized tests.*** Recent case law demonstrates that the abuse of IQ tests has led to the assignment of disproportionate numbers of minority and poor children to slow learning classes or classes for the educable mentally retarded. Where tests are the primary criterion for such special placement and where special placement constitutes a form of racial or socio-economic isolation, testing processes merit judicial review: "Schools should bear the legal burden ('burden of proof') of demonstrating that the IQ tests upon which many of those decisions are premised can reliably predict school performance for different types of students."****

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*Anne Anastasi, "Some Implications of Cultural Factors for Test Construction," Testing Problems in Perspective, Washington, D. C., American Council on Education, pp. 453-56, 1966.

**Note: The American Association on Mental Deficiency defines adaptive behavior as the effectiveness or degree with which the individual meets the standards of personal independence and social responsibility expected of his age and cultural group.

***Jane Franseth and Rose Koury, Survey of Research on Grouping as Related to Pupil Learning, Washington, D. C., U. S. Office of Education, 1966, p. 36.

****David L. Kirp, p. 34.

A re-analysis of the U.S. Office of Education's Equality of Educational Opportunity (1966) concludes that classroom integration benefits the black student's verbal achievement.* Black students "accorded separate treatment with others of their race...felt inferior and stigmatized."** The concentration of minority and/or poor students in special education programs may be completely inadvertent and not based on racial premises. But "[these] factors - that racially disproportionate sorting does plausible educational harm and affects a vulnerable minority - suggest that judicial attention is appropriate."*** A school district showing such disproportion should be required to demonstrate that sorting serves "substantial independent educational purposes."**** The burden of proof thus falls on the schools to prove the efficacy of the classification scheme.

In Hobson v. Hansen,***** decided in 1967, the "tracking" system in the District of Columbia was attacked. In this system students were placed in "ability groups" on the basis of performance on scholastic achievement and ability tests. A disproportionate number of black and poor children were assigned to the lower tracks. The "basic" track, based primarily on scoring lower than 75 on an IQ test, corresponded to special education classes for

*James McPartland, "The Relative Influence of School and Classroom Desegregation in the Academic Achievement of Ninth Grade Negro Students," Journal of Social Issues, Summer 1969, p. 25.

**Racial Isolation in the Public Schools, Washington, D. C., U. S. Commission on Civil Rights, 1967 po. 86-87.

***David L. Kirp, p. 37

****Ibid.

*****269 F.Supp. 401 (1967).

the educable mentally retarded. Placement tended to be permanent with little interaction between levels. Judge Wright stated that the District of Columbia tracking system denied equal educational opportunity to the District's students, and that the labeling of students amounted to de facto racial and economic classification. The tracks correlated with race and socio-economic status. Black students with a low income background were confined to lower tracks, were reevaluated infrequently, and had an education inferior to those in higher level tracks.

The judge's conclusion was that the use of ability tests for classification purposes violated black students' rights to equal protection of laws as guaranteed by the Fourteenth Amendment to the United States Constitution. He found that track assignments were made on the basis of ability tests which were standardized on white middle class students and produced misleading test scores for black and lower class students. The burden of proof was shifted to the schools:

> [T]he law has a special concern for minority groups for whom the judicial branch of government is often the only hope for redressing their legitimate grievances; and a court will not treat lightly a showing that educational opportunities are being allocated according to a pattern that has unmistakable signs of invidious discrimination. Defendants, therefore, have a weighty burden of explaining why the poor and the Negro should be those who populate the lower ranks of the track system.*

The defendants failed to demonstrate that the classification was reasonably related to the ability to learn. The court decreed that the defendants were

*269 F. Supp. 401 (1967).

"permanently enjoined from discriminating on the basis of racial or economic status in the operation of the District of Columbia public school system."* It was further ordered that the track system was to be abolished.

Beginning in 1970 a series of cases alleging misclassification on the basis of IQ testing was initiated. The misclassification pertained primarily to the label "mentally retarded." In Larry P. v. Riles** six black children from the San Francisco Unified School District brought a class action suit on behalf of all similarly situated children. Plaintiffs alleged that they had been misclassified as mentally retarded on the basis of IQ tests. It was alleged that such tests were biased against those unfamiliar with a white middle class background. When retested with provision for removing test bias, the plaintiffs scored higher than the cut-off point for mental retardation.

The court stated that the disproportionate number of black students in classes for the educable mentally retarded (EMR) constituted a "suspect classification;" blacks constituted 66% of all EMR classes and only 28% of the district's enrollment. The court held that intelligence should be randomly distributed throughout a population. Therefore, a proportionate representation with respect to race should be expected in EMR classes. The court found that misclassification caused irreparable injury and that IQ tests, the primary basis for EMR assignment, were culturally biased.

*269 F.Supp. 401 (1967).
**343 F.Supp. 1306 (N.D. Cal., June 20, 1972), Civ. No. C-71-2270 RFP (N.D. Cal., December 13, 1974).

On the basis of evidence before it, the court decided that the burden of proof should be shifted to the defendants requiring them to demonstrate the rationality of the classification system. The court, arriving at this determination relied on cases involving employment discrimination under Title VII of the Civil Rights Act of 1964, jury selection, and school desegregation.*

The defendants in Larry P. were not able to sustain their burden. A denial of equal protection of the law for black children was established. Therefore, once again, denial of equal educational opportunity was equated to denial of Fourteenth Amendment equal protection.

On an appeal in 1974 the class represented by plaintiffs was extended to include all black, misclassified children in the State of California. In the decision of the appellate court, state and local school officials were restrained from:

- Using standardized, individually administered ability or IQ tests which did not account for the cultural background or life experiences of black children
- Listing as approved any such individual intelligence test
- Placing black children in EMR classes on the basis of such test results.

In 1971, in response to Larry P. and other cases such as Diana,** the California Legislature revised testing and evaluation procedures to include

*See Griggs v. Duke Power Co., 401 U.S. 424 (1971); Western Addition Community Organization v. Alioto, 340 F.Supp. 1351 (N.D. Calif. 1972); Carmical v. Craven, 457 F.2d 582 (9 Cir., 1971); United States v. School District 151 of Cook County, 286 F.Supp. 786 (N.D. Ill., 1968), aff'd., 404 F.2d 1125 (7th Cir., 1968).

**Civ. No. 37 RFP (1970), infra.

measures of adaptive behavior, a complete psychological examination, developmental history and parental consent prior to placement. As a direct result of Diana, the State consented to use Spanish language IQ tests. The State also ordered that districts with over-representation of Mexican Americans end this disproportionality by 1976. In 1972 the Larry P. decision barred San Francisco from placing children in EMR classes on the basis of IQ testing only. At this time the legislature declared racial and ethnic balance to be state policy. Any district with a black over-representation of 15% or more was suspect.

On the basis of Judge Peckham's ruling in the 1974 Larry P. appeal, the California State Board of Education abolished, effective February 5, 1975, the use of the IQ test as an evaluative instrument for the educable mentally retarded. There is currently no substitute for this omission of test information; other activities must be used in combination to evaluate learning disabilities or retarded intellectual development:

- School/home interviews
- Observation in both academic and non-academic settings
- Achievement and diagnostic test information
- Estimates of adaptive behavior by using the American Association on Mental Deficiency (AAMD) approved* scale and home visits
- Evaluation of medical history.

*The California State Board of Education has approved for use the Revised AAMD Adaptive Behavior Scale, School Version. The Department of Education anticipates in the near future the availability of other scale or measures such as the "System of Multicultural Pluralistic Assessment" (SOMPA) that is under development by Dr. Jane Mercer of the University of California at Riverside. SOMPA includes an IQ test balanced by measures of adaptive behavior.

A draft information sheet on the EMR program prepared by the California State Board of Education details the objective data to be collected and considered prior to EMR classification.*

In recent years numerous other testing cases have highlighted the principles of the Larry P. decision. In 1970 seven poor students brought a class action suit on behalf of all black and/or low income students in the Boston school system who have been or might be misclassified as mentally retarded. In Stewart v. Phillips** plaintiffs alleged that IQ tests were biased and normed on white middle class students; plaintiffs also claimed that these tests failed to distinguish among a range of learning disabilities and were administered by unqualified psychologists. The case is still in the discovery stage. However, in 1972 partly in response to this suit, the Massachusetts legislature passed Chapter 766 of the Massachusetts Statutes which established comprehensive evaluation and placement techniques as well as procedural safeguards. To date, implementation of this law has been limited due to financial constraints. If this law is fully implemented, the allegations in the Boston suit will probably be dropped.

In Lebanks v. Spears*** eight black children brought a class action suit on behalf of all citizens of the Parish of Orleans in Louisiana who might be or who had been similarly classified as mentally retarded and denied equal educational opportunity. In 1973 a consent agreement was

*See Appendix C.
**Civ. No. 70-1199-F (D., Mass., 1970).
***60 F.R.D. 135 (1973).

signed. The stipulation provided for revised evaluation, placement, and due process procedures. In this suit it was agreed that the evaluation of a child must:

- not result in a recommendation for placement in special classes for the retarded by affixing the label retarded on any child in any way unless (1) he has an IQ on an individually administered IQ test of 69 or below, (2) he is also substantially subnormal in adaptive behavior or measures to be agreed upon; and (3) he is still rated substantially subnormal on both measures after the effects of socio-cultural background have been taken into account.

- If such retardation is indicated, the evaluation must result in a detailed recommendation for a specific education plan, including detailed educational diagnosis, prescription, and a mutually agreeable system of indicating progress goals if the plan is eventually implemented...*

This stipulation is similar in intent to the California and Massachusetts laws. Lebanks, however, did not result in legislation for Louisiana. This lack of legislation may be explained by the fact that Louisiana is still deeply involved in school desegregation. The legislature may have chosen to avoid complicating the older desegregation issue with the new tracking issue; it may have preferred to deal with only one major educational policy matter at a time. Certainly Louisiana is not bound to follow the California-Massachusetts precedent of legislating with respect to IQ testing and tracking.

*Ibid.

In 1975 a stipulation signed by the Rhode Island Society for Autistic Children and the Board of Regents in Rhode Island required the State to adjust the mental retardation IQ test cut off grade for socio-cultural bias, and introduced the requirement of adaptive behavior measures.

> No child may be classified as retarded and/or placed in a program for the retarded unless, after a full adequate evaluation, he is found to be abnormal in adaptive behavior and further has an IQ of below 70 on an individually administered intelligence test after adjustment for socio-cultural bias. For each child whose home language is other than English such test should be conducted by persons fluent in the child's home language.*

Once again, a suit has resulted in out-of-court agreements.

In a more recent suit filed on April 25, 1975 on behalf of black, handicapped school aged children in the State of Mississippi, plaintiffs alleged that defendants were utilizing discriminatory test and evaluation procedures. A consent decree is currently being negotiated.**

Obvious forms of misclassification have also been shown to occur when a child is given an IQ test in a language other than his own. In Diana v. State Board of Education,*** a United States District Court in California adopted a stipulation and order with the following provisions:

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*RISAC v. Board of Regents, Civ. No. 5081 (D.R.I., October 1975).

**Mattie T. v. Johnston, Civ., No. DC-75-31-5. Clearly, the reason for Louisiana's avoidance of legislation in reference to tracking could be applied to Mississippi. See Footnote to Lebanks, supra.

***Civ. No. C-70 37 RFP (1970).

1) All children whose primary home language is other than English (e. g., Spanish, Chinese, etc.) from now on must be tested in both their primary language and in English.

2) They may be tested only with tests or sections of tests that don't depend on such things as vocabulary, general information ("Who wrote Romeo and Juliet?"), and other similar unfair verbal questions.

3) Mexican-American and Chinese children already in classes for mentally retarded must be retested in their primary language (unless they were previously tested in it) and must be reevaluated only as to their achievement on non-verbal tests or sections of tests.

4) Each school district is to submit to the state in time for next school year a summary of retesting and reevaluation and a plan listing special supplemental individual training which will be provided to help each child back into regular school classes.

5) State psychologists are to work on norming a new or revised IQ test to reflect Mexican-American culture. This test will be normed by giving it only to California Mexican-Americans so that in the future Mexican-American children tested will be judged only by how they compare to the performance of their peers, not the population as a whole.

6) Any school district which has a significant disparity between the percentage of Mexican-American students in its regular classes and in its classes for the retarded must submit an explanation setting out the reasons for this disparity.*

This settlement in the State of California pre-dates the revision of California evaluation and placement procedures discussed in connection with Larry P. and also pre-dates the subsequent abolition of IQ tests for EMR placement. It helped to stimulate the legislature to deal with testing

*Classification Materials Revised Edition 1973, p. 226, Center for Law and Education, Harvard University, Cambridge, Mass., 1973.

and tracking procedures. In Diana nine Mexican-American school children brought a class action on behalf of all bilingual Mexican-Americans who were or would be placed in EMR classes in the State of California. A California study in 1966-67 revealed that 26% of the children in EMR classes were of Spanish surname while such students comprised 13% of the total student population. On retesting the plaintiffs in English and/or Spanish, seven of the nine scored above the cut off point for mental retardation.

In both Larry P. and Diana the court established percentages of significant minority group disproportionality in special education classes. In these cases the percentage of minority group participation in special classes was two or more times that of the percentage in the California school system. In response to Diana and Larry P., the California Legislature prohibited minority group disproportionality in special education classes. This disproportionality was defined to exist where the minority group participation in a district's special education classes exceeds by 15% or more the percentage of that group in the district's total educational programs.

In 1975 in Catherine D. Pittenger, a case which extended the principles of equal educational opportunity and due process to all handicapped children in Pennsylvania, a settlement was reached after the issuance of new State education regulations. These regulations prohibited the "disproportionate" assignment of minority group children to special education programs without a compelling educational rationale.

In two recent cases where no decision has been reached yet by the court, plaintiffs allege minority group disproportionality in certain special education programs. In Mattie T. v. Johnston plaintiffs allege that the percentage of black children in EMR programs is 76.9%, while black participation in the entire Mississippi school system totals 51.7%. In Lora v. New York City Board of Education the plaintiffs cite a 92% minority participation in "SMED" (Socially Maladjusted-Emotionally Disturbed) day school programs with a school district wide minority percentage of only 67.9%.*

In 1972, two settlements similar to Diana and Larry P. were reached. In Covarrubias v. San Diego Unified School District,** black and Mexican-American students alleged that IQ tests used for classification purposes were racially, culturally and linguistically biased. A stipulation required that all such children be retested in accordance with the procedure put forth in the California Education Code. Hence, this case called for compliance with the new law but refused to construe the language of the statute specifically.

In Guadalupe Organization, Inc. v. Tempe School District No. 3*** plaintiffs in an Arizona District Court charged that a disproportionate number of bilingual children were enrolled in EMR classes, and that placement practices were linguistically biased. An agreement was reached which stipulated that

*Civ. No. 75c 914 (E.D. N.Y. filed June, 1975).
**Civ. No. 70-394-S (S.C. Calif., August 21, 1972).
***Civ. No. 71-435 (D. Arizona, May 9, 1972).

children in EMR programs must be reevaluated and that in the future testing of bilingual children must be in the home or primary language.*

In New York City IQ test scores are a major criterion for placement in classes for the mentally retarded. In most cases efforts are made to measure adaptive behavior. Tests are, however, rarely administered directly in the child's home language when it is other than English. This and a 10-13% over-representation of minority students in programs for the mentally retarded or emotionally disturbed make the New York City public school system subject to judicial review, and may warrant action by the State Legislature.** While New York is not bound to follow the lead of California and Massachusetts by legislating in this area, it has been known to follow the leads of these states in the educational field in the past (e.g., with respect to sex discrimination in education). Perhaps developing an appropriate statute at an early date would avoid a potentially expensive and time consuming lawsuit. The burden of proof would fall on the schools to demonstrate that all testing procedures are non-discriminatory and that IQ tests are reliable predictors of school performance.

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*Arizona was apparently not provoked to legislate on the testing-tracking question by this case. Perhaps the lack of de jure segregation in that state caused the legislature to decide that this was an isolated case and would not require revision of state law to create a more equitable educational atmosphere for all students in the state.

**See Table 3, "Court Established Examples of Minority Group Disproportionality in Special Education Classes."

TABLE 3

COURT ESTABLISHED EXAMPLES

OF

MINORITY GROUP DISPROPORTIONALITY IN SPECIAL EDUCATION CLASSES

COURT CASE	PERCENT MINORITY GROUP IN SPECIAL CLASS	PERCENT MINORITY GROUP IN SCHOOL SYSTEM
1) Diana v. State Board of Education Civ. No. C-70 37 RFP (N.D. Calif. January 7, 1970)	26% Hispanic EMR	13% Hispanic in California
2) Larry P. v. Riles* a) 343 F. Supp. 1306 (N.D. Calif. June 20, 1972)	66% Black EMR	28% Black in San Francisco
b) Civ. No. C.-71-2270 RFP (N.D. Calif. December 13, 1974)	60% Black EMR	30% Black in California
3) Catherine D. v. Pittenger Civ. No. 74-2435 (E.D. Penn. June 27, 1975)	"Disproportionate" in Comparison with % in Entire School System	
4) Mattie T. v. Johnson Civ. No. DC-75-31-5 (N.D. Miss. filed April 25, 1975)	Decision Pending 76.9% Black EMR	51.7% Black in Mississippi
5) Lora v. N.Y.C. Board of Education Civ. No. 75 C 917 (E.D. N.Y. filed June 11, 1975)	Decision Pending 92% Minority in "SMED" Day School	67.9% Minority New York City

*The California Legislature responded to Diana and Larry P. by defining racial disproportionality to exist where the percentage of minority group participation in special classes exceeds by 15% or more the minority group participation in a District's educational programs.

NOTE ON LORA V. BOARD OF EDUCATION

The New York City Board of Education is currently involved in a suit, Lora v. Board of Education,* brought in federal court on June 11th, 1975 by seven black and Puerto Rican children attending special day schools for the socially maladjusted and emotionally disturbed ("SMED" day schools). The plaintiffs alleged that their rights to equal protection, due process and freedom from involuntary servitude were violated by their placement in racially and sexually segregated SMED day schools. While the specific issue of IQ testing was not challenged, the absence of suitable evaluation techniques was targeted in this case.

Plaintiffs alleged that there was no mechanism for establishing the educational and social needs of the individual child prior to placement in an appropriate program. They further held that the SMED day school population was 92% black and Hispanic, while the school system was only 59.8% black and Hispanic.

Since April of 1975, the Board of Education has required the "certification" of emotionally disturbed children prior to placement in SMED day schools. These procedures have still to be scrutinized by the court. It would behoove the Board of Education to review evaluation and placement procedures for any discriminatory practices, and also to implement the due process procedures available to parents of children awaiting special placement.

*Civ. No. 75 C 917 (E. D. N. Y., June, 1975).

SECTION V

DUE PROCESS REQUIREMENTS IN MAKING SPECIAL EDUCATION PLACEMENTS

The United States Constitution provides in the Fifth Amendment that no person shall "be deprived of life, liberty or property without due process of law", and in the Fourteenth Amendment that

> no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any state deprive any persons of life, liberty, or property without due process of law.

Due process of law may be defined as a course of legal proceedings carried out regularly and in accordance with established rules and principles. With respect to the education of the handicapped this process consists of a full hearing involving the exercise of judgment prior to a child's removal from "regular" classes for special education placement. Clearly, exclusion from state provided, free public education constitutes an absolute deprivation of an important right; and placement in special classes may diminish education opportunities and stigmatize the handicapped child. Procedural due process as established by the courts would protect the individual child's interest by insuring the accuracy of a child's evaluation, the soundness of any proposed program and the adequacy of its resources. Procedural safeguards would, ideally, guarantee the selection of an appropriate individualized education program from a range of alternatives.

In the last five years due process protection for handicapped children has been guaranteed by both litigation and legislation. The landmark cases of PARC* and Mills** provide a hearing procedures model for more recent court cases. By 1974 the Council on Exceptional Children found that

*334 F. Supp. 1257 (E.D. Pa., 1971) and 343 F. Supp. 279 (E.D. Pa., 1972).
**Civ. No. 1939-71 (D.D.C., 1972).

twenty-five states provided for some form of due process for handicapped children either in statutes or state regulations.*

The New York State Commissioner of Education has promulgated regulations for due process effective May 1st, 1976 and now the recent federal Education for All Handicapped Children Act of 1975 also requires extensive due process procedures prior to special placement.

The Council for Exceptional Children, in A Primer on Due Process, identifies the sequence of steps needed to satisfy due process requirements for the handicapped:

> That sequence is intended to meet the test of adequate procedural due process by providing sufficient procedural safeguards so that when an individual is faced with a decision or potential decision affecting his educational environment, he has the opportunity to be heard in his own behalf as well as the right to impartial resolution of conflicting positions.**

The Primer further identifies the following essential elements of the due process procedures:

- Timely and written notice must be given prior to the identification, evaluation, or educational placement of a handicapped child.
- An opportunity to respond to the substance of such notice must be provided.
- A hearing must be held, if necessary, in which the child and his parent, guardian, or surrogate and/or their representative, such as legal counsel of their own choosing, will have an opportunity to review and challenge all evidence, (including relevant school records), cross examine all witnesses, present evidence, obtain an independent evaluation, and receive a complete and accurate record of the procedings.

*Council for Exceptional Children, "State Policy Regarding Due Process and Mainstreaming," October 1, 1974.
**Abeson, Bolick, Hass, eds., p. viii, Reston, Virginia, 1975.

- The burden of proof as to the recommended action must be borne by the education agency through the presentation of appropriate evidence.

- The hearing officers will make a decision solely on the evidence presented at the hearing.

- Opportunity must exist for the parties to appeal the decision of the hearing officer.*

The aim of due process procedures should be to eliminate unnecessary classification or labeling, and to guarantee handicapped children an education appropriate to their needs. In 1972 PARC led the way toward fulfilling due process requirements for the handicapped by stipulating that "no child who is mentally retarded or thought to be mentally retarded can be assigned initially or reassigned to either a regular or special educational status, or excluded from a public education without a prior recorded hearing before a special hearing officer." A twenty-three step procedure was established to guarantee due process. The procedure provides for the following:

- Detailed notice of the proposed change in educational status and any alternative educational opportunities.

- The parents' right to contest the proposed action at a full due process hearing.

- The parents' and child's right to be represented at the hearing by a person of their choosing including legal counsel.

- The parents' right to review all related records, tests or reports on which the proposed action may be based.

- The parents' right to compel the attendance of persons who may have evidence on which the proposed placement is based.

- The parents' right to present evidence and to cross examine witnesses.

*Ibid.

- No change in the child's educational status, except in extraordinary circumstances, prior to the hearing officer's decision.

The Mills decision, also in 1972, established similar procedural safeguards for all handicapped children in the District of Columbia. In the following year, the Lebanks consent agreement required that due process safeguards be extended to all handicapped children in the Parish of Orleans, Louisiana.

In June of 1975 the Catherine D. v. Pittenger suit was settled when the Pennsylvania State Board of Education adopted rules and regulations which entitled all handicapped children to a full due process hearing prior to classification and educational placement. Several months later a similar settlement was reached in RISAC for all handicapped children in the State of Rhode Island. The Mattie T. v. Johnston suit, still outstanding, alleged failure to provide such safeguards throughout the identification, evaluation and placement processes for all handicapped children in the State of Mississippi.

Concurrent with the settlement of the PARC and Mills cases, the State of Massachusetts Legislature enacted Chapter 766, a new special education statute which called for procedural safeguards similar to those required by the courts. The Massachusetts special education law is still considered to be the model state statute concerning education of the handicapped.

Two years after the enactment of Chapter 766, however, the federal legislature passed the Education for All Handicapped Children Act. This act requires any state or local educational agency, receiving financial assistance in accordance with the act, to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards.*

The standards of procedural due process for handicapped children have been well established both by the courts and by legislatures across the United States. Any curtailment of due process under a lack of funds argument would probably be doomed to failure if challenged in court; the courts and legislatures find due process of paramount importance.

In order to comply with New York State and federal requirements, the New York City Board of Education must finalize and document due process procedures immediately.**

*See Appendix D.
**See Table 4: Procedural Due Process in Identification, Evaluation and Educational Placement of Handicapped Children.

Table 4

PROCEDURAL DUE PROCESS IN IDENTIFICATION, EVALUATION AND EDUCATIONAL PLACEMENT OF HANDICAPPED CHILDREN

COMPONENT	EDUCATION FOR ALL HANDICAPPED ACT P.L. 94-142*	NEW YORK STATE REGULATIONS	NEW YORK BOARD OF EDUCATION DRAFT PROCEDURES
Notice to Parents Prior to Evaluation	Required	Required	Not Yet Fully Documented And Established
- in home language	Required	Required	
Parental Permission for Evaluation	Required	Required	
Notice to Parent Concerning Placement	Required	Required	
- in home language	Required	Required	
- classification and placement	Required	Required	
- reasons for decision	Required	Required	
- availability of school records	Required	Required	
- right to obtain impartial due process hearing	Required	Required	
- procedures for appeal	Required	Required	
- right to independent evaluation at no cost to parent	Required	Required	
- child remains in current placement pending decision	Required	Required	
Informal Hearing		Required	
Impartial Formal Hearing	Required	Required	
- chief school officer or designee conducts	Required	Required	
- summary record made	Required	Required	
- interpreters for home language at District expense	Required	Required	
- evidence and testimony for all parties	Required	Required	
- right to legal/professional counsel	Required	Required	
- possible assignment of surrogate	Required	Required	
- hearing closed to public except at parent request		Required	

*Effective Date for Requirements is 10/1/77.

Table 4

Continued

COMPONENT	EDUCATION FOR ALL HANDICAPPED ACT P.L. 94-142*	NEW YORK STATE REGULATIONS	NEW YORK BOARD OF EDUCATION DRAFT PROCEDURES
- opportunity to cross-examine witnesses	Required	Required	Not Yet Fully
- if over 18, child may attend If under, parents may request attendance		Required	Documented And Established
- written findings of fact and recommendations submitted	Required	Required	
- objections submitted		Required	
- decision made on record		Required	
- procedures for appeal explained	Required	Required	
State Administrative Review	Required	Required	
- written appeal directed to Commissioner of Education	Required	Required	
- child remains in current placement pending decision	Required	Required	
- further appeal made by commencing a civil proceding	Required	Required	
Surrogate Parents			
- school district register		Required	
- qualifications			
* not officers, employees or agents of school system or department	Required	Required	
* no conflicting interest	Required	Required	
* acquainted with child's needs		Required	
* same background as child		Required	
* familiar with educational system		Required	
- assignment			
* request filed with child's district		Required	
* notice to parent or guardian		Required	
* assignment where needed		Required	
* representation continues to periodic review of placement		Required	

*Effective Date for Requirements is 10/1/77.

NOTE ON KATHY KELLY V. BOARD OF EDUCATION

The State Commissioner of Education's decision in the Kathy Kelly* case provides for parental use of the new due process appeals procedure in New York City. In this case petitioners brought a class action on behalf of 1100 handicapped students who were enrolled for the first time in non public schools for the 1975-76 school year. Petitioners alleged that the enrollment was based on a representation by the New York City Board of Education that no adequate public placement was available, and that therefore the Board of Education could contract for services from these non public schools. The Board of Education maintained that suitable public school placement was available for most of the petitioner children and that non public placement contracts would be entered into for only 300 pupils.

The Commissioner ordered that petitioner children be allowed to stay in non public schools for the 1975-76 school year, but that the Board of Education must determine and identify appropriate placements in public or non public schools for school year 1976-77. Parents would then have access to the new administrative appeals procedures in cases of disagreement with a proposed placement.

*Kathy Kelly v. Board of Education of the City of New York, Administrative Procedure before the New York State Commissioner of Education No. 9234, April 6th, 1976.

SECTION VI

FEDERAL LAWS AND REGULATIONS

Passage of the Education for All Handicapped Children Act (Public Law 94-142 hereafter called EHA) demonstrates Federal Government recognition and codification of the Constitutional rights of handicapped children.* The act relieves the deprived handicapped of the difficulty of bringing suit on Constitutional grounds. While Congress was not bound to follow any particular state's lead for legislating in the field of special education, it apparently decided that a national scale recognition of rights was necessary due to the plethora of suits in recent years. Future suits by classes of handicapped children will deal with enforcement and interpretation of EHA rather than proof of existence or deprivation of Constitutional rights. This crucial transition from declaration to implementation of rights will bring the possibility of state provided free public education for all handicapped children closer to reality.

The handicapped child is now recognized as an individual who has the right to a free public education which satisfies his or her own particular needs. Comprehensive evaluation procedures and program planning must take into account both individual strengths and weaknesses. The principle of the

*See Appendix D.

"least restrictive alternative", the right to a full due process hearing, and then implementation of additional procedural safeguards should result in appropriate nondiscriminatory evaluation and placement of handicapped children.

OVERVIEW OF EHA

> It is the purpose of this act to assure that all handicapped children have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.*

On November 29, 1975 EHA was signed into law. In EHA a formula is established to provide school districts in each state with a progressively escalating percentage of the national average expenditure per public school child times the number of handicapped children being served. The percentage will grow each year until 1982 when it will constitute 40% of the average expenditure. The new formula will replace the current "Mathias formula" in fiscal 1978.** Using the current national average per pupil expenditure the following authorization ceilings are generated:

*The Education for All Handicapped Children Act, Section 601 (c).
**The 1975-1976 funding level was $100 million.

Fiscal 1978	five percent	- $387 million
Fiscal 1979	ten percent	- $775 million
Fiscal 1980	twenty percent	- $1.2 billion
Fiscal 1981	thirty percent	- $2.32 billion
Fiscal 1982	forty percent	- $3.16 billion

At the date this report went to press, an appropriation of $315 million was approved by Congress for 1978 (Approved 10/76).

EHA represents four years of legislative work and, in the words of U. S. Senator Harrison Williams (Democrat, New Jersey; the original sponsor of the Senate version), EHA is "the most significant development in our national elementary and secondary education program since Title I (ESEA) was enacted ten years ago."

EHA requirements include:

- The full service goal (a free and appropriate public education for all handicapped children)*
- Confidentiality of records
- Placement in the "least restrictive alternative"
- An interdisciplinary team approach in evaluation and placement
- Annual review of placement
- An individualized education plan for each child

*Incentive grants of not more than $300 per child are available for the provision of education and related services to handicapped children age three to five. See EHA, Section 619.

- Parental access to all records
- Right to independent evaluation
- Assignment of a surrogate where parents are unknown or unavailable
- Parental notice prior to change in or initiation of identification, evaluation or placement
- Parental permission prior to testing and placement
- Parent participation and consultation
- An impartial due process hearing for matters related to identification, evaluation or placement
  - Right to counsel and expert advice
  - Right to present evidence and cross-examine witnesses
  - Right to a record of a hearing, findings and decisions
- Nondiscriminatory testing and placement practices
  - Nondiscriminatory materials and procedures
  - Test administration in home language
  - Comprehensive assessment procedure

New York City must comply with these requirements in order to receive federal funds for education of the handicapped.*

*See Table 5: Evaluation and Placement of Handicapped Children: Federal and New York State Requirements.

Table 5

EVALUATION AND PLACEMENT OF HANDICAPPED CHILDREN

FEDERAL AND NEW YORK STATE REQUIREMENTS

COMPONENT	EDUCATION FOR ALL HANDICAPPED ACT P.L. 94-142	SECT. 504 - REHAB. ACT TITLE VI-CIVIL RIGHTS ACT TITLE IX-EDUCATION AMENDMENT 1972	NEW YORK STATE LAW AND COMMISSIONER'S REGULATIONS
Full Services Goal:			
Identification	Required	Required	Required
Evaluation	Required	Required	Required
Placement			
3-18 years	Required 9/1/78 (Effective Date)	Required (no age specified)	Required (0-21)
3-21 years	Required 9/1/80		
Confidentiality of Records	Required 1976		
Placement In Least Restrictive Alternative	Required 10/1/77	Required	
Interdisciplinary Team Approach In Evaluation and Placement	Required 10/1/77		Required
Annual Review of Placement	Required 10/1/77	Required	Required
An Individualized Education Plan For Each Child	Required 10/1/77	Required	
Parental Access to All Records	Required 10/1/77		Required
Right to Independent Evaluation	Required 10/1/77		Required
Assignment of Surrogate Where Parent Unknown or Unavailable	Required 10/1/77	Required	Required
Parental Notice Prior To Change In Or Initiation of Identification, Evaluation or Placement	Required 10/1/77	Required	Required
Parental Permission Prior to Testing and Placement	Required 10/1/77		
Parent Participation and Consultation	Required 10/1/77		
Impartial Due Process Hearing For Matters Related to Identification, Evaluation or Placement			
- Right to Counsel and Expert Advise	Required 10/1/77	Required	Required
- Right to Present Evidence and Cross Examine Witnesses	Required 10/1/77	Required	Required
- Right to Record of Hearing, Findings and Decisions	Required 10/1/77	Required	Required
Non-Discriminatory Testing and Placement Practices			
- Non-Discriminatory Meterials and Procedures	Required 10/1/77	Required	
- Test Administration In Home Language	Required 10/1/77	Required	
- Comprehensive Assessment Procedure	Required 10/1/77	Required	Required

DEFINITIONS

EHA defines the term "handicapped children" as "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired or other health impaired children or children with specific learning disabilities who by reason thereof require special education and related services."*

Special education means "specifically designed instruction at no cost to parents and guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions."**

FULL EDUCATIONAL OPPORTUNITIES GOAL

In order to be eligible for federal assistance under EHA, each state and local education agency must maintain a policy which assures the right to a free and appropriate public education for all handicapped children. As put forth in EHA, this "right to education" policy is a basic civil rights requirement. To implement this policy, procedures should have been instituted effective 11/29/75, to locate all children who are handicapped within a state or within the jurisdiction of a local education agency. (This is commonly referred to as "child find.") All children currently receiving such education are to be identified and evaluated for appropriate placement. This provision would seem to include institutionalized children as well as those receiving special education in public or non-public schools.

*EHA, Section 602(1).
**Part A, Section 602(16).

The goal of this policy is the provision of full educational opportunities to all handicapped children with a timetable for implementation and a description of resources necessary for accomplishing the goal. Public education must be available for handicapped children aged three to eighteen by September 1, 1978, and for children aged three to twenty-one by September 1, 1980, unless inconsistent with state law.*

CONFIDENTIALITY OF RECORDS

EHA requires that procedures be established by the Commissioner to protect the confidentiality of data collected by the State during the identification, location and evaluation of all handicapped children.

Regulations drafted by the Commissioner, and soon to be adopted, require the following:

- Notice. Parents will be informed of the requirements regarding the confidentiality of records, the data to be collected and their rights as well as children's rights.
- Access Rights. Parents will have access to data relating to their children.
- Hearing Rights. Parents may challenge the data at a hearing.
- Consent. Parental permission is required prior to the disclosure of data to any non-participating agency, prior to a use other than the intended, and prior to seeking data directly from a child.

*In New York State, a public education must be made available to children under the age of twenty-one.

- State and Local Access to Data. Personally identifiable data will not be disclosed without parental permission, except to participating agencies.

- Safeguards. Each participating agency will protect the confidentiality of data at all stages.

- Destruction of Data. Personally identifiable data will be destroyed within five years after the data is no longer needed, except for a permanent record which may be maintained.

- Children's Rights. Policies and procedures will include the extent of children's rights.

LEAST RESTRICTIVE ALTERNATIVE AND INDIVIDUALIZED EDUCATION PROGRAM

Each state and local education agency must establish procedural safeguards to guarantee, as far as is practicable, the participation of handicapped children within the regular educational programs (effective 10-1-77). Handicapped children include those in public or private institutions or care facilities. Handicapped children should be educated with children who are not handicapped. Placement in special classes, special separate schools or any placement outside of the regular educational environment should occur "only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily ..."*

Draft regulations for EHA** specify that each state education agency is responsible for establishing a policy on the "least restrictive alternative"

*EHA, Section 612(5).

**Draft regulations for EHA are put forth in the Third Draft Consolidation Concept Paper Under Part B of the Education of the Handicapped Act as Amended by Public Law 94-142, Department of Health, Education and Welfare, Office of Education.

and developing a plan to assure implementation by public and private education agencies throughout the state. A continuum of program alternatives should be available to suit the various needs of handicapped children.

The local education agency must establish, revise and review, at the beginning of each school year, an individualized education program for each handicapped child. Such plans must be reviewed at least once a year. The EHA defines an individualized education program:

> The term...means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statements shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.*

PROCEDURAL SAFEGUARDS

Each state and local educational agency must develop procedural safeguards to guarantee a free and appropriate education for all handicapped children within their jurisdiction. (Effective 1975-10/1/77.)**

*EHA, Section 602(19), effective 10/1/77.

**See Table 4: Due Process Requirements in the Evaluation and Placement of Handicapped Children.

EHA requires the participation and consultation of parents or guardian of a handicapped child in the establishment of the full service goal. Such procedures must provide the parents or guardian with the opportunity to review all records which pertain to the identification, evaluation and placement of a child. A parent or guardian also has the right to obtain an independent educational evaluation of the child at no cost to the parent. Procedures must also be established to protect the rights of a child when the parents or guardian are unknown or unavailable, or the child is a ward of the state, and a surrogate must be assigned to represent them. According to draft regulations, the state must establish procedures to protect the rights of a child when the parents are not known, unavailable or when the child is a ward of the state. These procedures should include the assignment of an individual to act as surrogate for the parents. Such procedures must include methods for determining which children need a surrogate parent and for assigning a surrogate parent to a child.

Whenever the agency proposes to initiate or change the identification, evaluation or placement of a child, written prior notice in the parents' home language (unless clearly unfeasible) is required. Parental permission should be required before any testing is carried out. The draft regulations state that such notice must:

- Describe in detail the proposed requested or denied action and the appropriateness of the action for the child

- Identify the evaluation procedures, tests, records or reports upon which the action is based

- State that school files, records, and reports pertaining to the child will be available for inspection

- Describe in detail the right to obtain a due process hearing if there are objections to the proposed or requested action, including a description of all the rights regarding procedures at such a hearing

- Indicate the opportunity to obtain an independent evaluation of the child at public expense

- Describe the procedures for appealing the decision resulting from the due process hearing.

- State that the child will remain in the present educational placement, unless the state or local educational agency and the parents of the child otherwise agree, until such time as there is a decision following the due process hearing or until a proposed educational placement is accepted by the parties.

The EHA provides for an opportunity to hear any complaint related to a child's identification, evaluation or placement in an appropriate public education program. An impartial due process hearing must be conducted by the state or local education agency for such complaints. The hearing officer must not be an employee of the involved agency or a person with a personal or professional interest which would conflict with his of her objectivity in the hearings.

Any party to any hearing must be given:

- The right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children.

- The right to present evidence and confront, cross-examine, and counsel the attendance of witnesses.

- The right to a written or electronic verbatim record of such hearing.
- The right to written findings of fact and decisions.*

The decision made at the hearing is final unless a party of the hearing appeals the decision. Appeals may be directed to the state educational agency which will conduct an impartial review of the hearing. If the party is not satisfied with the decision of the appeal, further action may be taken by bringing a civil action in any state court of competent jurisdiction or in a district court of the United States.

Unless the parents and the involved agency agree otherwise, during any of these proceedings the child will remain in the current education program. If the child is applying for admission to a public school, with the consent of the parent the child may be placed in the public school program pending completion of the proceedings.

NON-DISCRIMINATORY TESTING AND PLACEMENT

EHA requires each state to develop procedures to "assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory."** EHA requires that all materials or procedures be "provided or administered in the child's native language ... unless it is not feasible to do so...."*** EHA further

*EHA, Section 615(d).
**Ibid, Section 612(5) (c).
***Ibid.

states that "no single procedure shall be the sole criterion for determining an appropriate educational program for a child."*

The draft regulations state that the following procedures must be adopted by state education agencies to insure that evaluation and placement materials and procedures will not be racially or culturally discriminatory.

- Formal evaluation; use of existing evaluation data.
  - A formal evaluation must be conducted before any action is taken with respect to (1) the initial placement or denial of placement of a handicapped child into a special education program, or (2) the transfer or denial of transfer of a child from a special education program to full-time regular class placement.
  - Any changes in a child's special education placement (such as changing from a self contained special class to a resource room) will be based on (1) the child's current individualized education program . . . (2) and other information relating to the child's current educational performance, and (3) existing formal evaluation data on the child which is not more than two years old.
- Evaluation procedures. The evalution procedures required . . . shall assure, at minimum, that:
  - Tests and similar evaluation materials are provided and administered in the child's native language or mode of communication, unless it is clearly not feasible to do so.
  - Tests and similar evaluation materials have been properly and professionally validated for the specific purpose for which the recipient proposes to use them;

*Ibid.

- Tests and similar evaluation materials are recommended by their producer for the specific purpose for which the State or local educational agency proposes to use them, are administered in conformance with the instructions provided by their producer, and are administered by personnel who meet appropriate certification of licensure requirements under state law;

- Tests and similar evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

- Test selection and administration is such that, when a test is administered to a child with impaired sensory, manual or speaking skills, the best results accurately reflect the child's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where such skills are the factors which the test purports to measure);

- No one test or type of test or other means of evaluation is used as the sole criterion for placement;

- Information from sources other than ability or achievement tests, including information concerning physical condition, sociocultural background, and adaptive behavior in home and school, is gathered and considered and the weight given to each of these sources is documented;

- The interpretation of the evaluation data and the subsequent determination of the child's educational placement are made by a team or group of persons knowledgeable about the child, the meaning of the evaluation results, the placement options, and the personnel available to provide appropriate educational and related services.

- If the information derived either from ability and achievement tests or from other sources results in a showing that the child does not, because of handicap, need instruction in a special setting, the child will not be placed outside the regular instructional setting.

- Reevaluation. Each State educational agency shall provide procedures to assure (a) that each handicapped child's individualized education program is revised periodically, but not less than annually, and (b) that a formal evaluation of the child is conducted every three years, or more frequently whenever conditions warrant, including at the request of the child's parents or teachers.

OTHER FEDERAL REGULATIONS

The provisions of the Education for All Handicapped Children Act have been strengthened by the development of other federal standards to insure the non-discriminatory assignment of children to special education programs. These standards are based on the requirements of three federal statutes:

Title VI of the Civil Rights Act of 1964

- No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title IX of the Education Amendments of 1972

- No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ...

Section 504 of the Rehabilitation Act of 1973

- No otherwise qualified handicapped individual in the United States ... shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The Office of Civil Rights (OCR) of the United States Department of Health, Education and Welfare is responsible for the development of compliance standards and for the enforcement of the provisions of each statute. The OCR issued standards for compliance with Title VI of the Civil Rights Act and Title IX of the Education Amendments in an August, 1975 memorandum entitled "Identification of Discrimination in the Assignment of Children to Special Education Programs."* This memorandum, similar in intent to official regulations, has the force of law. It states that over or under inclusion of certain handicapped children, or the utilization of referral, placement or treatment practices which subject children to discrimination may constitute noncompliance with Title VI or Title IX.

Any adverse impact on handicapped children resulting from the following practices may constitute a violation:

- Failure to adopt nondiscriminatory criteria for referral for placement
- Failure to adopt procedural safeguards for parents and children including:
  - prior to written notice to parents in their home language
  - an impartial due process hearing
  - a surrogate parent where required
  - provisions for decisions which are binding on all parties after hearings with opportunity for appeal
  - a policy of the least restrictive alternative

*See Appendix E.

- Failure to adopt nondiscriminatory evaluation procedures including sociocultural and adaptive behavior factors
- Failure to assign handicapped children to individually prescribed educational programs
- Failure to adopt procedures for annual comprehensive reevaluation
- Failure to guarantee the effectiveness of special education programs for all cultural-linguistic backgrounds.

On May 17th, 1976 the Federal Register published the OCR proposed regulations for Section 504 of the Rehabilitation Act of 1973. The regulations would require:

- A free public education for each handicapped person
- Educational services in the most normal setting feasible
- Educational services which most meet the individual needs of the person in question
- A full evaluation of individual needs including:
  - tests which are provided and administered in the primary language of the child
  - tests which are tailored to assess the specific areas of educational needs not merely those which provide a single intelligence quotient
  - use of more than one test as criterion for placement
  - use of information other than ability or achievement tests including:

- information concerning physical condition
- sociocultural background
- adaptive behavior in home and at school

- An annual reevaluation of the individual's educational needs and progress
- The establishment and implementation of procedural safeguards as required by Section 615 of the Education for All Handicapped Children Act.

The Office of Civil Rights is currently conducting an equal educational services review of the New York City public school system. The sources of legal authority for this review are:

- Title VI of the Civil Rights Act of 1964
- Title IX of the Education Amendments of 1972
- Section 504 of the Rehabilitation Act of 1973.

The issues to be investigated include the following:

- Whether comparability exists between districts, schools, or classrooms with respect to instructional and noninstructional expenditures, facilities and other services
- Whether children are being denied access to educational programs on the basis of their race, color, national origin, sex or handicap through bias in evaluation practices, language barriers, enrollment and curricular limitations
- Whether the effect of assigning children to ability groups or tracks, special education programs, or programs for gifted children is to create and maintain isolated environments within the schools so as to place children at a disadvantage because of their language or culture, race, sex, or handicap

- Whether children are treated discriminatorily on the basis of their race, color, national origin, sex, or handicap in the conduct of school-sponsored extracurricular activities, counseling, referral, or disciplinary procedures.

On completion of the review, the OCR will make a finding of compliance or noncompliance. In the case of noncompliance, an administrative hearing may be held or the case may be taken to the Department of Justice. Any remedy, which may include withdrawal of Federal financial assistance, will be applied to the entire school system.

SECTION VII

NEW YORK STATE LAWS AND REGULATIONS

The "Giuffreda" Bill represents New York State's response to the federal Education for All Handicapped Children Act (EHA) of 1975 which codified the Constitutional rights of handicapped children. Signed by the governor in July of 1976, this new version of Article 89 of the New York State Education Law extends the "right to education" to all handicapped children under twenty-one years of age in New York State. It further establishes procedures which will guarantee the due process rights of handicapped children.

The New York State Commissioner of Education has issued, effective November 1, 1976 regulations to implement Article 89.* These regulations reflect, for the most part, a recognition of recent legal trends and of policies put forth in the federal EHA.**

FINANCIAL AID

The New York State Education Law for the Handicapped provides for two types of per pupil financial aid. For pupils certified as non-severely handicapped,*** the basic state aid per pupil is doubled. The per pupil aid for each severely handicapped student**** is $2,985.81.

*See Appendix F: Amendment to the Regulations of the Commissioner of Education Pursuant to Section 207 and 4403 of the Education Law - Part 200 of the Commissioner's Regulations

**See Table 7: Evaluation and Placement of Handicapped Children - Federal and New York State Requirements, p. II-6.

***See handicap category definition infra.

****Ibid.

Since the early 1960's, Section 4407 of the New York State Education Law required local districts to evaluate medical, psychological and educational data in order to make recommendations to the State Education Department as to whether the district public school could meet a handicapped child's educational needs. In the case that it could not, recommendation was made for placement in a nonpublic school facility and the State contracted for such services with funding up to $2,500 (minus the local share) per year for such placement. In 1974, the New York City Board of Education assumed responsibility for contracting with nonpublic schools for the education of handicapped children from the state, when Section 4404(2)(b) of the State Education Laws superceded Section 4407.

Section 4404(2)(b) required the local school district to assume the financial responsibility for the education of a handicapped pupil in any type of educational facility, excepting out-of-State residential treatment centers. The State Legislature raised the ceiling last year for 4404(2)(b) tuition payments to $4,234.34 per pupil. New York State's share of this payment was $2,985.81. New York City Board of Education tax levy funds provided for the balance of the $4,234.34 or $1,248.53. The State agreed to honor Family Court orders or DSEPPS Executive Director orders (up to $4,800) requiring that the full cost of tuition, in excess of $4,234.34, for handicapped pupils be paid by the City, with 50% reimbursement by the State. Under Section 4403 of the State Education Laws a Family Court or the DSEPPS Executive Director could issue such an order and the City had to provide funds for full tuition payment; the funding was 50% reimbursable by the State if approved by the State Education Commissioner.

With the passage of the "Giuffreda" bill, this method of financing education for the handicapped has been modified to nearly eliminate the necessity of petitioning the Family Court or the DSEPPS Director for excess nonpublic school tuition payments by the City and the State. The local school district is now permitted to contract directly with a nonpublic school for full tuition costs, and it will be reimbursed by the State an amount of money calculated on the basis of a new "excess cost" formula and ratio.

DEFINITIONS

The new Article 89 of the State Education Law defines a handicapped child as:

> " ... a person under the age of twenty-one who is entitled to attend public schools ... and who because of mental, physical or emotional reasons can receive appropriate educational opportunities from special services and programs ..."

In order to receive state aid for the handicapped, the New York City Board of Education must categorize students by handicapping condition and by severity in the following mannner.

Severely Handicapped

- Severely crippled and health impaired - a child who must function in a physical environment specially designed; or needs medication intervention and/or maintenance.

- Severely handicapped (deaf) - a child with a hearing handicap in excess of 80 decibels (ISO) in the better ear whose degree and type of hearing loss is so severe that spoken language cannot be acquired normally and whose receptive and expressive communication skills are so limited that additional supportive services are provided.

- Severely emotionally disturbed - a child whose emotional disturbance is so severe that the child is unable to relate to other children and may have an absence of speech, and in addition needs the support of clinical services. A severely emotionally disturbed child is one whose condition has been determined to be such by a school psychologist, psychiatrist, or by an approved mental health clinic.

- Multiply handicapped - a child who, because of the multiplicity of his handicapping conditions, requires intervention by more than one certified specialist in the area of education of the handicapped. For puposes of this section, visually impaired children shall be included, but those children whose second handicap is solely in the area of speech shall not be included.

- Trainable mentally retarded - a child who, on the basis of a comprehensive evaluation, such evaluation to include an individual psychological examination, is determined to possess general intellectual capacity that falls lower than three standard deviations below the mean of the general population, cannot profit from programs established for the educable mentally retarded, but may be expected to profit from special programs for the trainable.

Handicapped

- Trainable mentally retarded - a child who, on the basis of a comprehensive evaluation, such evaluation to include an individual psychological examination, is determined to possess general intellectual capacity that falls lower than three standard deviations below the mean of the general population, cannot profit from programs established for the educable mentally retarded, but may be expected to profit from special programs for the trainable.*

- Educable mentally retarded - a child who, on the basis of a comprehensive evaluation, such evaluation to include an individual psychological examination, is determined to possess general intellectual capacity that falls lower than 1.5 standard deviation below the mean of the general population, cannot profit from regular classroom instruction but may be expected to profit from a special education program for the educable.

*While New York City classifies all trainable mentally retarded children as severely handicapped, some school districts in Northern New York State classify trainable mentally retarded children as handicapped. The category "trainable" is therefore found under "severely handicapped" as well as "handicapped."

- Severely speech impaired - a child with unintelligible speech or inability to communicate verbally who is provided daily instruction in regular or special classes by a certified teacher of the speech and hearing handicapped.

- Hearing impaired - a child with a hearing handicap in the 40 and above decibel range (ISO) whose hearing loss precludes his functioning normally in a regular classroom situation without the supportive services of an itinerant teacher or a resource room program.

- Visually impaired - a legally blind child with the visual capacity of 20/200 or less in the better eye with the best correction, or a field of vision restricted to a 20 degree arc.

- Partially sighted - a child whose visual acuity in the better eye with best correction ranges between 20/70 and 20/200, including those children who can still function capably with their residual vision and who have a medically indicated progressive visual loss, or a recurring serious medical eye problem affecting acuity and operable eye diseases.

- Emotionally disturbed - a child whose condition has been determined to be such by a school psychologist, a psychiatrist, or by an approved mental health clinic.

- Physically handicapped - a child who manifests a condition which incapacitates the child and includes orthopedic, neurological, and other medical conditions which result in inability to benefit from the regular education programs for non-handicapped children, without some form of special assistance.*

The State Education Department is now required to define, by mid 1977, criteria for determining disorders which may be considered learning disabilities. The Department is further required to describe appropriate diagnostic procedures and to recommend any appropriate program with finance recommendations.**

*Amendment to the Regulations of the Commissioner of Education Pursuant to Section 207 and 4403 of the Education Law, Part 200, Section 200.2.
**New York State Education Law, Section 4403.

FULL EDUCATIONAL OPPORTUNITIES GOAL

The New York State Constitution provides for the "maintenance and support of the system of free common schools, wherein all the children of this state may be educated."* Children between the ages of six and sixteen are subject to the New York State compulsory education requirement.

The Board of Education is required to locate and identify all handicapped children, from birth to age 21, who reside in the district.** The Board of Education is required to provide "suitable educational opportunities"*** for handicapped children under the age of twenty-one by use of the following special services or programs:

- Special classes, part-time programs, resource rooms, alternative learning centers, home instruction, and special teachers to include itinerant teachers and pupil services as provided by the schools of the district of residence.
- Contracts with other districts for special services or programs.
- Contracts with or special services provided by boards of cooperative educational services.
- Contracts with private nonresidential schools which have been approved by the commissioner and which are within the state for special services or programs.
- Contracts with private nonresidential schools which have been approved by the commissioner and which are outside of the state for special services or programs.
- Contracts with private residential schools which have been approved by the commissioner and which are within the state for special services or programs.

*New York State Constitution, Section 1.
**Commissioner's Regulations, Section 200.12.
***New York State Education Law, Section 4402.

- Contracts with private residential schools which have been approved by the commissioner and which are outside the state for special services or programs.

- Appointment by the commissioner to a state or state-supported school ...*

INTEGRATION WITH REGULAR CLASSES AND INDIVIDUALIZED EDUCATION PROGRAMS

The New York State Education Law requires that the needs of the individual child determine which services should be provided.** Where the handicapping condition does not preclude functional participation in activities with non-handicapped children, classes must be located in public school buildings where there are "regular" classes in order to promote "the participation of handicapped children in regular school activities." Adequate classroom space, facilities and equipment must be provided.*** This policy is not directly supportive of mainstreaming, and raises interesting questions with regard to the education of the handicapped in special public schools such as the school for the deaf, the schools for the socially maladjusted and emotionally disturbed, and in nonpublic schools serving one particular handicap category.

The Commissioner's Regulations require school districts to use state aid apportionment for "educationally advantageous programs," that is, programs "which are clearly designed to achieve educational objectives which are consistent with the handicapping conditions of the pupils served."**** The regulations specificially require the

*Ibid, Section 4401
**Ibid, Section 4402.
***Commissioner's Regulations, Section 200.4.
****Ibid, Section 200.2.

annual preparation of an individualized education program for each child, in accordance with federal EHA requirements. This plan must be designed to meet the unique needs of each handicapped child, and must be developed in a planning conference. The individual education plan must include:

- A statement of present levels of educational performance of such pupil.
- A statement of annual goals, including short-term instructional goals.
- A statement of the specific educational services and instructional materials to be provided to such pupil, and the extent to which the pupil will be able to participate in regular education programs.
- The projected date for initiation and anticipated duration, of such services.
- Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the instructional objectives are being achieved.*

The planning conference must be conducted in accordance with the following regulations:

- The conference for each handicapped pupil shall be conducted as soon as possible after the beginning of the school year, but no later than the thirtieth day of attendance upon instruction by the pupil.
- Participants at the planning conference shall include a representative designee of the committee on the handicapped, the pupil's teacher or teachers, the parent or guardian of such pupil and, whenever appropriate, the pupil.
- The notice of the planning conference given to parent or guardian of the pupil shall inform such parent or guardian that the conference will be conducted at a date and time which is mutually acceptable to the parent or guardian and the employees of the school district.

*Ibid, Section 200.4.

- If it is not possible or practicable for the parent or guardian to attend the conference, other alternatives may be attempted, including individual or conference telephone discussions.

- In order to assure active parent participation, an interpreter may accompany the parent to allow communication in his native or primary language.*

EVALUATION AND PLACEMENT**

Each school district must provide for each handicapped child

- a physical examination in accordance with the provisions of section 904 of the Education Law (this requirement has not been met recently due to budget contraints in the New York City Department of Health)

- an individual psychological examination by a school psychologist (this is defined as a comprehensive process by which a school psychologist uses a variety of psychological and educational techniques in the child's dominant language, to study and describe a pupil's developmental, learning, behavioral, and other personality characteristics for the purpose of educational planning.)

- a social history

- and other suitable examinations and evaluation as may be necessary to ascertain the physical, mental and emotional factors which contribute to the handicapping condition.***

These reports must be provided to the committee on the handicapped which is established by the Board of Education to identify, review and

*Ibid, Section 200.4.
**For placement of blind, deaf and severely physically handicapped in State operated and supported schools, see the Commissioner's Regulations Section 200.6.
***Ibid, Section 200.3.

evaluate at least annually, the status of each handicapped child within the school district. The committee membership includes a school psychologist, a teacher or administrator of special education, a school physician and a parent of a handicapped child residing in the school district.

In New York City, thirty-two committees on the handicapped have been established; one for each community school district. Section 4402 of the New York State Education Law defines the responsibilities of the committees to include:

- Determination of whether a child possesses a handicapping condition by a thorough review of all relevant pupil information.
- Recommendation for special education services - continuation, modification or termination of special class placement.
- Provision of at least an annual review of the status of each handicapped pupil and the status of programs, services and facilities.
- Determination of the frequency and nature of periodic re-evaluation and enforcement of the requirement that each child be re-examined by a qualified psychologist at least every three years.
- Periodic evaluation of the adequacy of facilities, programs and services for the handicapped.

PROCEDURAL SAFEGUARDS

When a committee on the handicapped recommends special education classification and placement or a change in placement for a handicapped child, notice must be given to parents. This notice must:

- Describe the proposed classification and the reasons why such classification was deemed appropriate for the child.

- Specify the tests or reports upon which the proposed classification was based.

- State that the school files, records and reports pertaining to the child will be available for inspection and interpretation. Such records shall be available for review and duplication at reasonable costs for those authorized to request them.

- Advise the parent or legal guardian of the child of his opportunity to address the committee, either in person or in writing, on the propriety of the committee's recommendations on program placements to be made to the Board of Education.

- Describe in detail the right to obtain a hearing ... if there are objections to the proposed action.

- Include a statement of procedures for appealing the decision resulting from the formal hearing.

- Include a statement indicating that the parent shall be afforded an opportunity to obtain an independent educational evaluation of the child and which shall include the names, addresses and telephone numbers of appropriate public agencies where such services can be obtained.*

Within ten days after notice of recommendation or change in program, a parent may make a written request for an impartial formal hearing. Procedures for such hearing are as follows:

- The Board of Education or trustees shall appoint an impartial hearing officer to conduct the hearing. The hearing officer shall be authorized to administer oaths and to issue subpoenas in connection with the administrative proceedings before him.

- A record of proceeding before the hearing officer shall be maintained and made available to the parties.

*Commissioner's Regulations, Section 200.5.

- At all stages of the procedures, where required, interpreters of the deaf or interpreters fluent in the primary language of the child's home shall be provided at district expense.

- The impartial hearing officer shall preside at the hearing and shall conduct the proceedings in a fair and impartial manner so that all parties shall be afforded an opportunity to present evidence and testimony.

- The parties to the proceedings may have representatives, including, but not limited to, legal counsel and may be accompanied by other professional persons.

- Unless a surrogate parent shall have previously been assigned, the impartial hearing officer shall, prior to the hearing, determine whether the interests of the child would best be protected by assignment of a surrogate parent.

- The hearing shall be closed to the public unless the parents request an open hearing.

- The parents, school authorities and their respective representatives shall have an opportunity to confront and question all witnesses at the hearing.

- If the child is over the age of eighteen, he or she shall have the right to attend the hearing.

- If the child has not attained the age of eighteen, the parents shall have the right to determine whether the child shall attend the hearing, except that upon a finding of the impartial hearing officer that attendance of the child would be harmful to his/her welfare, the child may be excluded from portions of or the entirety of the hearing.

- At the conclusion of the testimony, the impartial hearing officer may adjourn the hearing to a specified date not more than 14 days after the conclusion of the testimony to permit the preparation of the transcript. The impartial hearing officer shall transmit one copy of the transcript to the parents, and one copy to the school authorities.

- The impartial hearing officer shall submit his recommendation to the Board of Education within five days from his receipt of the transcript. Copies of the recommendation shall also be transmitted by registered mail to the parents and to school authorities. The parents or school authorities may submit objections in writing to the recommendation of the impartial hearing officer to the Board of Education within five days from the receipt of such recommendation.

- The Board of Education shall render a decision within five days after the last day for the submission of objections to the recommendation of the impartial hearing officer. The decision of the Board of Education shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. The decision shall also include a statement advising the parents of their right to obtain a review of such decision by the Commissioner.

- When a Board of Education is notified in writing by a child's parent or guardian, by a professional staff member of that district, or by a licensed physician that there is reason to believe that such child may possess a handicapping condition which would require the provision of special educational services, the Board of Education shall provide for a determination of eligibility and classification for the pupil's placement in an appropriate special educational service or program in either a public or private facility within thirty days of such notification. Thereafter, if such child is found eligible for special educational placement, the Board of Education shall arrange for such placement within a further period of no longer than thirty days.*

After receipt of the decision, a parent or school authority may appeal to the Commissioner of Education for further consideration. During

*Ibid, Section 200.5.

this administrative appeal the child will remain in his current placement unless the commissioner or local school district and the parents or legal guardian otherwise agree. The decision of the commissioner or his designee may be appealed by commencing an Article 78 proceeding to review the determination.

Section 200.7 of the Commissioner's Regulations explains the registration and assignment procedures for surrogate parents:

- Register. Each school district shall compile a register of individuals willing to appear on behalf of a child under circumstances where the child's natural parents or guardian are unknown or unavailable or where the child is a ward of the State.

- Qualifications. Persons selected as surrogate parents shall not be officers, employees or agents of the local school district or State Education Department involved in the education or care of children, and shall to the maximum extent possible:

  - Have no other interest which could conflict with their primary allegiance to the child they would represent.

  - Be committed to acquaint themselves personally and thoroughly with the child and the child's educational needs.

  - To the maximum extent possible, be one of the same racial, cultural and linguistic background as the children they seek to represent.

  - Be generally familiar with the State and local educational system.

- Procedures for assigning surrogates. Assignment of a surrogate parent to a particular child shall be made in accordance with the following procedures:

  - Any person whose work involves education or treatment of children who knows of a child who may need special education services, and who knows that the parents or guardians are not known or are unavailable, or the child is a ward of the State, may file a request for assignment of a surrogate to the child with the child's school district.

- The school district shall send notice of the possible need for a surrogate to the adult in charge of the child's place of residence and to the parents or guardians at their last known address.

- The school district shall determine whether the parents or guardians are unknown or unavailable, or whether the child is a ward of the State. This determination shall be completed within a reasonable time following the receipt of the original request for a surrogate. If the school district finds that there is need for a surrogate, such assignment shall be made by the chief school officer within ten days.

- Once assigned, the surrogate shall represent the child at least through the time of the first periodic review of the child's educational placement. In all instances, where appropriate, the child shall be represented by a surrogate parent throughout the entire review process.

CONCLUSION

Like the federal Education for All Handicapped Act, (P.L. 94-142), the New York State Education Law provides for a free public education for all handicapped children; the State law includes children from birth to twenty-one years. With the exception of deaf children aged three to five and certain family court petitioners on behalf of children under the age of five, no mention is made of the manner in which the children younger than pre-school age are to be identified or serviced. It must be noted that the State's handicap categories are confining and emphasize a child's limitations only. "Negative labeling" is thus encouraged and funding is based on this labeling rather than on the service needs of children.

Although Section 904 of the New York State Education Law for Medical and Health Service requires the "medical inspector" (or public health doctor)

to arrange examinations for all potentially handicapped children having visual, hearing, and physical disabilities, this requirement is not currently carried out, primarily for budgetary reasons. The education law does not provide for an early screening program to take its place.

The concept of "mainstreaming" a child, or providing him or her with the "least restrictive alternative" (in accordance with the federal act) receives minimal support in Article 89. Furthermore, although a comprehensive assessment procedure is required prior to classification, Article 89 does not directly address the issue of non-discriminatory testing and placement procedures. Due process procedural safeguards are codified in the state statute, and detailed in the Commissioner's Regulations. These procedures reflect national policy and should form the basis of New York City's due process procedures. The Board of Education is currently finalizing these in accordance with the new State regulations.

SECTION VIII

RECOMMENDATIONS FOR PROCEDURAL CHANGES IN THE EVALUATION AND PLACEMENT OF HANDICAPPED CHILDREN

Recent changes in state and federal policies related to the classification of handicapped children mandate immediate procedural changes within DSEPPS. These recommendations reaffirm and support the ongoing efforts of DSEPPS in procedural and organizational reform. Our goal is a concerted, well organized effort to comply with new policy requirements.

1. Develop a new system of classification which places the emphasis on services needed by the individual rather than on the label itself. Utilize traditional labeling only for state and federal reporting purposes.

   - Continue research to determine the most appropriate model for implementation of this recommendation.
   - Develop programs and placement systems which are non-categorical in nature and which are based on individual learning needs. This shift in emphasis will permit the school system to break out of the dichotomy of "regular" classes and "special" classes.
   - Introduce the concept of the educational plan or prescription, which is already being used by the Board of Education Evaluation and Placement Units, to the whole special education population. The use of this plan, which should include a profile of an individual's strengths and weaknesses, will form the basis of a new categorization based on educational needs. The Education for all Handicapped Children Act describes an educational plan as:

     . a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents

or guardian of such child, and, whenever appropriate, such child, which statements shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

- Propose legislation in New York State similar to that in Massachusetts and Tennessee which does away with conventional categorization and reimburses local school districts on the basis of services required. (In 1957 the state of Minnesota began to pay two thirds of the cost for personnel serving handicapped children.)

2. Continue to implement the policy of the "full service goal" by offering each handicapped child immediate and appropriate placement.

- In order to implement this policy as required by the Education for all Handicapped Children Act, procedures must be instituted to locate all children who are handicapped within the jurisdiction of the New York City Board of Education. This is commonly referred to as "child find." (DSEPPS is already conducting two multi-media publicity compaigns to publicize the special needs of handicapped children and to guide parents to special education programs.)

- An early screening program which provides for a complete physical examination should be established. Suitable funding sources must be located.

  - Appropriate professionals should screen new school registrants

  - A Department of Health doctor should provide a complete physical examination in accordance with Section 904 of the New York State Education Law for Medical and Health Services (Budgetary constraints have limited the availability of such examinations.)

- Those children identified as having special educational needs should be referred for a comprehensive evaluation by Evaluation and Placement units.

3. The DSEPPS's unofficial policy of placement in the "least restrictive alternative" should be formalized. Continue to encourage mainstreaming where possible.

   - Placement practices should be modified to encourage placement in regular classrooms with resource or itinerant services or special classes in regular schools. Segregated facilities should be employed only when necessary to prepare pupils for an education in the mainstream.

   - Procedures for re-entry into the "regular" education system should be developed in keeping with requirements for the annual review of educational status and full re-evaluation of handicapped pupils every three years.

4. Fully document and establish due process procedures in DSEPPS.

5. Ensure nondiscriminatory testing procedures

   - Conduct comprehensive interdisciplinary evaluations which include observation of the child in a variety of settings - school, home and community. (This recommendation is already being implemented by the transfer of the evaluation of all handicapped children to interdisciplinary evaluation and placement units.)

   - Continue to expand, in accordance with State regulations, the role of Committees on the Handicapped in the identification, evaluation and placement processes.

   - Administer tests in the child's home language.

   - Require the use of measures of adaptive behavior and social adjustment as indicators of mental retardation.

   - Ensure parental involvement throughout the identification, evaluation and placement processes.

   - Utilize clinical services to guarantee re-testing every three years and re-evaluation at least annually.

APPENDIX A

ABSTRACTS OF LEADING CASES PERTAINING TO THE EVALUATION AND PLACEMENT OF HANDICAPPED CHILDREN

APPENDIX A

ABSTRACTS OF CASES REFERRED TO IN THIS REPORT

RIGHT TO EDUCATION/IQ TESTING, MISCLASSIFICATION AND RACIAL OVER-REPRESENTATION/DUE PROCESS

Catherine D. v. Pittenger, Civ. No. 74-2435 (E.D. Pa., June 27, 1975).

Diana v. California State Board of Education, Civ. No. C-70-37 RFP (N.D. Cal., Jan. 7, 1970).

Hobson v. Hansen, 269 F. Supp. 401 (D.D.C., 1967).

Kathy Kelly v. New York City Board of Education, No. 9234, New York State Commissioner of Education, April 6, 1976.

Lebanks v. Spears, 60 F.R.D. 135 (E.D. La., April 23, 1973).

Lora v. New York City Board of Education, Civ. No. 75-C-917 (E.D.N.Y., complaint filed June 11, 1975).

Mills v. District of Columbia Board of Education, 348 F. Supp. 866 (D.D.C., Aug. 1, 1972).

Larry P. v. Riles, 343 F.Supp. 1306 (N.D. Cal., June 20, 1972); Civ. No. C-71-2270 RFP (N.D. Cal., Dec. 13, 1974).

Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania; 334 F.Supp. 1257 (E.D. Pa., Oct. 8, 1971); 343 F.Supp. 279 (E.D. Pa., May 5, 1972).

Riley Reid v. New York City Board of Education, No. 8742, New York State Commissioner of Education, Nov. 26, 1973.

Rhode Island Society For Autistic Children v. Board of Regents for Education of State of Rhode Island, Civ. No. 5081 (D.R.I., Complaint filed Jan. 22, 1973).

Stewart v. Phillips, Civ. No. 70-1199 - F (D. Mass., Sept. 14, 1970).

Mattie T. v. Johnston, Civ. No. DC-75-31-5 (N.D. Miss., complaint filed April 25, 1975).

CASE:

Catherine D. v. Pittenger, Civ. No. 74-2435

COURT AND DATE:

U.S. District Court, Eastern District, Pennsylvania, June 27, 1975.

ALLEGATION:

The plaintiff, Catherine D., was a school-aged child bringing a class action on behalf of all exceptional children in Pennsylvania who were eligible for a free public education. It was alleged that these children had been or would be denied the opportunity to contest the appropriateness of a change in educational status or placement. The defendants were the Secretary of Education of the Commonwealth of Pennsylvania, the State Board of Education, the Great Valley School District and its Superintendent, and the Chester County Intermediate Unit No. 24 and its Executive Director. The defendants refused to hold a hearing for the plaintiff at which she could present expert evidence regarding her placement.

The plaintiff maintained that inappropriate placement constituted a withholding of her right to education, and represented a denial of procedural due process and equal protection.

DISPOSITION:

The named plaintiff ceased prosecution of her individual claim and chose instead to be remedied by a stipulation which applied the principles of due process to the plaintiff's case. This option did not dismiss the case as to remaining class members. They were permitted to maintain their suit.

The suit was settled when the Pennsylvania State Board of Education adopted rules and regulations which entitled all exceptional children to a full due process hearing prior to classification and educational placement. The right to hearing had previously applied only to mentally retarded children.

The State-adopted regulations included safeguards against discriminatory testing and disproportionate assignment of racial or ethnic groups:

> Whenever the percentage of persons from any identifiable group (racial or ethnic) assigned to special education programs is significantly disproportionate to the distribution of that group in the school district or intermediate unit; the Department of Education shall so notify the school district or intermediate unit. To maintain the assignments the intermediate unit or school district must then show evidence that the assignments are justified and the disproportion is necessary to promote a compelling educational interest of the persons affected.
>
> Chapter 13, Section 13.2

The regulations further provided for the "right to education" for all handicapped children, special education program guidelines and extensive due process safeguards. The safeguards are effective before a child has been classified exceptional or before a change in educational status. The safeguards include:

- the right to a parent conference
- the right to a formal due process hearing
- the right to classification based on substantial evidence
- the right to counsel
- access to records and tests scores
- the right to call witnesses
- the right to present new medical or psychological opinions
- the right to a decision after the hearing.

The court retained jurisdiction of the action pending satisfactory performance of the stipulation.

CASE:

Diana v. State Board of Education, Civ. No. C-70 37 RFP.

COURT AND DATE:

U. S. District Court, Northern District, California January 7, 1970.

ALLEGATION:

Nine Mexican-American school children brought a class action on behalf of all bilingual Mexican-Americans who were already or would in the future be placed in classes for the educable mentally retarded (EMR) in the state of California. The plaintiffs alleged that they were not mentally retarded and that the use of very verbal, culturally biased, and inappropriately standardized IQ tests segregated Mexican-American Children in EMR classes. A California study in 1966-67 revealed that 26% of the children in EMR classes were of Spanish surname while such students comprised 13% of the total student population. It was further alleged that the plaintiffs fell behind their peers academically and suffered irreparable injury.

Defendants were the State Superintendent for Public Instruction, State Board of Education, Comptroller of the State, State Treasurer, and the Superintendent and Trustees of the Soledad Elementary School District.

The results of retesting the plaintiffs in English and/or Spanish demonstrated that seven of the nine scored above the cut off point for mental retardation. Of the other two, one scored 70, the cut off point, and the other scored only three points lower.

DISPOSITION:

On February 3, 1970 the Court adopted a stipulation and order. The main points of the agreement were as follows:*

1) All children whose primary home language is other than English (e.g. Spanish, Chinese, etc.) from now on must be tested in both their primary language and in English.

2) They may be tested only with tests or sections of tests that don't depend on such things as vocabulary, general information ("Who wrote Romeo and Juliet?"), and other similar unfair verbal questions.

*Classification Materials Revised Edition 1973, Center for Law and Education, Harvard University, Cambridge, Mass., p. 226.

3) Mexican-American and Chinese children already in classes for mentally retarded must be retested in their primary language (unless they were previously tested in it) and must be reevaluated only as to their achievement on non-verbal tests or sections of tests.

4) Each school district is to submit to the state in time for next school year a summary of retesting and reevaluation and a plan listing special supplemental individual training which will be provided to help each child back into regular school classes.

5) State psychologists are to work on norming a new or revised IQ test to reflect Mexican-American culture. This test will be normed by giving it only to California Mexican-Americans so that in the future Mexican-American children tested will be judged only by how they compare to the performance of their peers, not the population as a whole.

6) Any school district which has a significant disparity between the percentage of Mexican-American students in its regular classes and in its classes for the retarded must submit an explanation setting out the reasons for this disparity.

NOTE:

On June 18, 1973, after the plaintiffs' return to court regarding failure to comply with the 1970 agreement, another stipulation was adopted. It required that:

- All districts still showing disparities should adopt a plan for reducing them
- Annual reports indicating the race and ethnic background of EMR students should be filed by school districts with the State Education Department
- Any disparities remaining after 1976 would be cause for a thorough program audit
- The progress in implementation should be reviewed between July 15, 1978 and September 1, 1978.

CASE:

Hobson v. Hansen, 269 F.Supp. 401.

COURT AND DATE:

U. S. District Court, District of Columbia 1967.

ALLEGATION:

The plaintiff brought a suit against the Superintendent of Schools and the Board of Education of the District of Columbia, and others. The plaintiff alleged that the Superintendent and the Board, in their operation of the public school system, unconstitutionally deprived black and poor children from equal educational opportunity. Specifically these children were denied services provided to white, more affluent public school children. The plaintiff's allegations focused on the track system, a special form of ability grouping, used in the District of Columbia school system.

DECISION:

The court found that the poor and majority black students in the District of Columbia were denied their right to equal protection under the law as guaranteed in the Fourteenth Amendment. The track system as administered in the District of Columbia, was found to discriminate on the basis of socio-economic and racial status. Significant features of the system included:

> separation of students into rigid curricula, which entails both physical segregation and a disparity of educational opportunity; and for those consigned to the lower tracks, opportunities decidedly inferior to those available in the higher tracks.

Education opportunities were allocated in a way which demonstrated invidious discrimination. Track assignments were made on the basis of ability tests which were standardized on and were relevant to a white middle-class group of students. The Court found that the tests produced misleading scores for lower class and black students. The defendants failed to demonstrate that the classification was reasonably related to the ability to learn.

DISPOSITION:

The court decreed that the defendants were "permanently enjoined from discriminating on the basis of racial or economic status in the operation of the District of Columbia public school system;" it was further ordered that the track system be abolished.

CASES CITED RELEVANT TO THIS REPORT:

Bolling v. Sharpe, 347 U.S. 497; Brown v. Board of Education, 347 U.S. 483 (1954).

NOTE:

This decision was affirmed in Smuck v. Hobson, 408 F.2d.175 (D.C. Cir. 1969).

PROCEEDING AND DATE:

Kathy Kelly v. Board of Education of the City of New York, Administrative Procedure before the New York State Commissioner of Education No. 9234, April 6, 1976.

FACTS:

On September 10, 1975 the New York City Board of Education notified all non-public schools for the handicapped that the Board lacked the funds to process applications for school year 1975-1976. It further indicated that a substantial majority of new pupils would be placed, instead in public school programs, and that contracts with non-public schools would be entered into for approximately 300 pupils for whom no public school program could be provided.

On October 9, 1975 petitioners brought an action in Supreme Court seeking declaratory and injunctive relief. On October 17, the application was granted restraining respondents from transferring or removing any petitioner from a non-public educational institution pending further court order, and directing the Board of Education to issue Family Court Orders to cover tuition costs during the current litigation period.

On November 5, 1975 the parties entered into a stipulation which held certain issues in abeyance while certain others were submitted to the Commissioner of Education.

ALLEGATION:

Three handicapped pupils, their parents and the Organization to Assure Services to Exceptional Children brought a class action on behalf of 1,100 handicapped students who were enrolled for the first time in the 1975-1976 school year in non-public schools. Petitioners alleged that this enrollment was based on a representation by the New York City Board of Education that no adequate public placement was available, and that therefore the Board of Education would contract for service from these non-public schools.

Petitioners contended that respondents refused to implement their statutory obligation to provide appropriate educational services to the class in question by refusing to enter into contracts pursuant to Education Law Section 4404. They sought an order preventing the respondents from:

> arbitrarily and unreasonably disrupting the education of petitioner children and attempting to precipitously transfer them, in mid-semester, against their will, into inadequate public school programs:

DECISION AND DISPOSITION:

Shortly after November 19, 1975 the Commissioner issued a stay order to maintain the status quo pending a decision on the appeal.

On April 6th, the commissioner sustained petitioners' appeal with respect to the current school year, but maintained that respondents must have discretion to determine proper placement for petitioner's children for the 1976-1977 school year. The Board of Education was ordered to determine and identify appropriate placements so that petitioners could utilize the administrative appeals procedure now available to them.

CASE:

Lebanks v. Spears, 60 F.R.D. 135

COURT:

U.S. District Court, Eastern District, Lousiana, April 23, 1973.

ALLEGATION:

Eight black children classified as mentally retarded brought a class action suit against the President of the Orleans Parish School Board, Members of the Board, the Superintendent for the Board, the Head of the Special Education Department of the Orleans Parish school system, the Louisiana Department of Hospitals and the Louisiana Department of Education. The suit was brought on behalf of all citizens of the Parish of Orleans who might be or have been similarly classified as mentally retarded and denied equal educational opportunity.

The Plaintiffs alleged that classification decisions were not made according to any ascertainable standards but were made pursuant to tests and procedures which were not valid and which were biased against blacks.

The plaintiffs further alleged that defendants had failed to provide them with an education suited to their needs, and had failed to provide education equally to blacks and whites. The complaint also cited violations of the plaintiffs' right to due process. The defendants failed to provide plaintiffs with hearings prior to classification or exclusion from education.

DISPOSITION:

On April 24th, 1973 a consent agreement was signed. The agreement included a detailed scheme of evaluation and placement procedures, educational plans and procedural safeguards.

> No children in a regular class in the Orleans Parish public schools, or newly entering the Orleans Parish public schools shall be referred by the Orleans Parish School Board for evaluation for possible retardation, labeled retarded, recommended for special education placement, placed in special education classes or excluded from the Orleans Parish public schools without (a) evaluation and development of a special education plan and periodic review and (b) provision of a free public program of education and training appropriate to his age and mental status.

The court further ordered that the evaluation must:

> not result in a recommendation for placement in special classes for the retarded not affixing the label retarded on any child in any way unless (1) he has an I.Q. on an individually administered I.Q. test of 69 or below, (2) he is also substantially subnormal in adaptive behavior or measures to be agreed upon; and (3) he is still rated substantially subnormal on both measures after the effects of socio-cultural background have been taken into account.
>
> [If such retardation is indicated, this must] result in a detailed recommendation for a specific education plan, including detailed educational diagnosis, prescription, and a mutually agreeable system of indicating progress goals if the plan is eventually implemented.

Evaluation and placement were to be preceded by written notice to parents concerning their rights. Procedures for a due process hearing were to be implemented.

CASES CITED RELEVANT TO THIS REPORT:

Mills v. Board of Education of District of Columbia, 348 F.Supp. 866 (D.D.C. 1972); Pennsylvania Association for Retarded Children v. Pennsylvania, 343 F. supp. 279 (E.D. Pa. 1972).

CASE:

Lora v. Board of Education of the City of New York, Civ. No. 75 C 917.

COURT AND DATE:

U.S. District Court, Eastern District New York, June 11th, 1975.

ALLEGATION:

The plaintiffs, seven black and Puerto Rican children attending special schools for the socially maladjusted and emotionally disturbed (SMED day schools or "600" schools) brought a class action suit for declaratory and injunctive relief against the New York City Board of Education. Defendants included Members of the Board of Education, the Chancellor of the Board of Education, the Commissioner of Education of the State of New York and the Executive Director of the Division of Special Education and Pupil Personnel Services of the New York City Board of Education. The plaintiffs alleged that their rights to due process, equal educational opportunity and freedom from involuntary servitude were violated by placement in racially and sexually segregated SMED day schools.

Specific allegations included the following:

- There is no mechanism for establishing the educational and social needs of the individual child prior to placement in an appropriate program
- There is no method for periodic review of evaluation and placement
- Parental consent to placement is the result of misinformation and coercion
- The population is 92% black and Hispanic while the school system is only 59.8% black and hispanic
- SMED day schools are sexually segregated
- The staff resources allocated to the classes for the emotionally disturbed program are greater in number than those allocated to the SMED day schools

CURRENT STATUS:

A motion for class action was defeated. A motion was denied for a preliminary injunction which would remove the named plaintiffs from SMED day schools unless they were provided with due process procedures and a full hearing prior to placement. A court approved team of experts is now evaluating the SMED day schools on behalf of the plaintiffs. The case is now in the discovery stage.

CASE:

Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866.

COURT AND DATE:

U.S. District Court, District of Columbia, August 1st, 1972.

ALLEGATION:

This class action suit was filed by seven "school excluded" children against the District of Columbia Board of Education, the Department of Human Resources and the Mayor. Plaintiffs were "exceptional" children labeled as behavioral problems, emotionally disturbed, mentally retarded, or hyperactive.

Plaintiffs alleged that although they could benefit from educational services, they have been denied admission to public schools with no provision for alternative educational placement or periodic review. They asked the court to 1) enjoin defendants from excluding them from the public educational system, and 2) compel defendants to provide them with immediate and adequate educational facilities in the public schools, or elsewhere at public expense.

Defendants contended that plaintiffs were attempting to force them to divert funds from other educational programs to educational programs for exceptional children, in violation of law and the rights of normal children. They also stated that the relief requested by plaintiffs could not be implemented unless Congress appropriated several million dollars for the purpose of improving special education in the District of Columbia.

DECISION:

The court issued a preliminary order that required defendants 1) to provide plaintiffs with a publicly supported education suited to their needs, 2) to provide plaintiffs' counsel with a list of excluded children, 3) to initiate efforts to identify members of the class not already known and, 4) to consider the selection of a master to determine the proper placement of children in contested cases.

The plaintiffs' motion for summary judgment was granted, and the Judge's opinion, judgment and decree were filed. The court stated that the Board of Education had an obligation to provide whatever specialized instruction was necessary to benefit exceptional children. By failing to provide exceptional children with the publicly supported specialized education to which they were entitled, the Board violated District of Columbia statutes, its own regulations, and the right of equal protection under the law. Also, due process of law was violated when exceptional children were suspended or expelled from regular or special schools, or reassigned from one school to another without being given a prior hearing or subsequent periodic review.

The court decided that the defense of insufficient funds was inadequate. Rather, the District of Columbia's interest in educating the exceptional children who were previously excluded from the schools outweighed its interest in preserving its financial resources. The court found that equity dictated that if funds were inadequate to provide all educational programs which were desirable, they should be expended in such a manner that no child would be entirely excluded from the public education to which he was entitled.

The court again ordered defendants to identify all unnamed members of the plaintiff class. Also, they were instructed to submit a plan for placing all of these children in educational programs. Defendants were ordered to place advertisements in the mass media, which were to state that all children had a right to a public education, regardless of handicap or disability, and to inform parents of the procedures required to enroll their children in such a program.

The judge decided that hearing procedures should be developed so that prior to a special placement or exclusion from regular education facilities, the reasons for such placement or exclusion and any objections could be fairly heard.

DISPOSITION:

Defendants were enjoined from excluding exceptional children from public education, and were ordered to seek out such children and to provide them with publicly supported educational opportunities.

CASES CITED RELEVANT TO THIS REPORT:

Brown v. Board of Education, 347 U.S. 483 (1954); Hobson v. Hansen, 269 F.Supp. 401 (D.C., D.C. 1967).

NOTE:

A motion for contempt was filed on March 27th, 1975. On June 6, 1975 the federal judge called for the appointment of a master to oversee the special education program in the District of Columbia public schools. School and Human Resources Department personnel were found to be in contempt of court. They failed to comply with the 1972 order that all handicapped children be provided with an education. The master was appointed on July 23rd to

- assess the appropriateness of special education programs for pupils in need of special services
- review the procedures by which children with special needs were identified, evaluated and placed

- report on procedures developed to implement the court order
- review budgeting estimates and the defendant's justifications for special education
- assist in preparing an implementation plan for the court decree
- file a report on necessary remedial actions.

CASE:

Larry P. v. Riles, 343 F.Supp. 1306.

COURT AND DATE:

U.S. District Court, Northern District, California, June 20, 1972.

ALLEGATION:

A class action was brought by six black children attending elementary school in the San Francisco Unified School District on behalf of all children in that District who were similarly situated. Plaintiffs alleged that they were not mentally retarded but had been misclassified and placed in classes for the educable mentally retarded (EMR) on the basis of IQ test results. The complaint stated that the black students were "the victims of a testing procedure which fails to recognize their unfamiliarity with the white middle class cultural background and which ignores the learning experiences which they may have had in their homes."

The defendants included the Superintendent for Public Instruction and the Members of the Board of Education for the State, and the Superintendent and Members of the Board of Education for the San Francisco Unified School District.

When retested with attempts to reword certain items and to give credit for intelligent but non-standard items, the plaintiffs scored significantly higher than the cut-off point (in this case an IQ of 75) for the educable mentally retarded (EMR).

DECISION:

The court concluded that the disproportionate number of black students in EMR classes constituted a "suspect classification"; blacks constituted 66% of all EMR classes and only 28% of the district's enrollment. The court upheld the assumption that intelligence was randomly distributed throughout a population; children in EMR classes, therefore, should be represented proportionately with respect to race.

The court found that the incorrect placement of children in EMR classes caused irreparable injury because curriculum was less demanding, teacher expectation was low, students were subjected to ridicule and had feelings of inferiority. The court further held that the IQ tests in question were culturally biased, and were the primary basis for EMR placement in the San Francisco Unified School District.

The burden of proof for justifying the use of IQ tests was shifted to the defendants who were not able to sustain their burden by establishing a rational relation between the test scores and the ability to learn. Even though the defendants claimed that the IQ tests were the "best means of classification currently available," a denial of equal protection under the law for black children was established.

DISPOSITION:

The court issued an order and memorandum for preliminary injunction requiring that ". . . no [b]lack student may be placed in an EMR class on the basis of criteria which rely primarily on the results of IQ tests as they are currently administered if the consequence of use of such criteria is racial imbalance in the composition of EMR classes."

NOTE:

On August 16th, 1974 the court affirmed the order in an appeal (Civ. No. C-71-2270 RFP).

CASES CITED RELEVANT TO THIS REPORT:

Griggs v. Duke Power Co., 401 U.S. 424 (1971); Hobson v. Hansen, 269 F.Supp. 401 (1967); Brown v. Board of Education, 347 U.S. 483 (1954).

CASE:

Larry P. v. Riles, Civ. No. C-71-2270 RFP

COURT AND DATE:

U.S. District Court, Northern District of California, December 13th, 1974.

ALLEGATION:

Plaintiffs were black school children in California who had been or might be misclassified and placed in programs for the educable mentally retarded (EMR) on the basis of standardized individual IQ tests. Plaintiffs moved for modification of the class description to include all such black children in California, and for further injunctive relief against the state and local defendants.

DECISION:

The court established that black children constituted approximately 30% of the total school population in San Franscisco while black representation in EMR classes was almost double this percentage. Over the past two years, the racial disparity increased; the defendants continued to administer IQ tests which did not take into account the cultural background and life experiences of black children. The court further established that black children constitute a disproportionate percentage of the total EMR enrollment in many California school districts.

DISPOSITION:

The plaintiffs' motion to modify the class description was granted. State and local defendants were restrained from:

- Using standardized individually administered ability or IQ tests which did not account for the cultural background or life experiences of black children
- Listing as approved any such individual intelligence test
- Placing black children in EMR classes on the basis of such test results.

Within twenty days of the court's decision in this case the court order, the findings of fact and conclusions of law were to be distributed to all school districts.

CASE:

Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania 334 F.Supp. 1257.

COURT AND DATE:

U. S. District Court, Eastern District, Pennsylvania, October 8th, 1971.

ALLEGATION:

The Pennsylvania Association for Retarded Children brought suit against Pennsylvania for the State's failure to provide a free public education for all retarded children. Plaintiffs included fourteen mentally retarded children who represented the class of all retarded children in Pennsylvania. The defendants included the State Secretaries of Education and Public Welfare, the State Board of Education and 13 school districts representing all school districts. Plaintiffs challenged the constitutionality of certain state statutes under which retarded children could be excluded from public education. In their suit plaintiffs attempted to secure the right to 1) notice and a full due process hearing prior to any change in educational status 2) a free public education program appropriate for the individual child's needs, and 3) compensatory education for the child who had been excluded from any education.

DISPOSITION:

The court found that all mentally retarded children can benefit from an educational program and training: ". . . the earlier such education and training begins, the more thoroughly and more efficiently a mentally retarded person will benefit from it; and whether begun early or not . . . a mentally retarded person can benefit at any point in his life and development from a program of education and training." The court found further that having undertaken to provide a free public education to regular children between the ages of six and twenty-one, such education must be provided to all children, including mentally retarded children.

> It is the commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity, within the context of a presumption that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training.

On June 18th, 1971 the court issued an interim order approving a stipulation concerning the plaintiff's due process claims. It was agreed that no change in the educational placement of a mentally retarded child could be made before adequate notice had been given as well as the opportunity for a full due process hearing at which the school district would bear the burden of proof.

On October 1st, 1971 the court issued an interim order and an injunction affirming a consent agreement concerning equal educational opportunity and the state law claims. The state could not apply any law which would postpone, terminate or deny mentally retarded children access to a publicly supported education. The plaintiff children were to be reevaluated and placed in suitable programs. By September 1972 all retarded children were to be placed in public school programs suited to their needs. Two court appointed masters were to oversee implementation.

NOTE:

On May 5th, 1972 the United States District Court issued an opinion, order and injunction affirming, with minor changes, the June 18th stipulation and October consent agreement (343 F.Supp. 279). The court held that the plaintiffs had established reasonable constitutional arguments under the due process and equal protection Clauses.

CASES CITED RELEVANT TO THIS REPORT:

Brown v. Board of Education, 347 U.S. 483 (1954). (1954).

PROCEDING AND DATE:

Riley Reid v. Board of Education of the City of New York, Administrative Procedure before the New York State Commissioner of Education No. 8742, November 26th, 1973.

FACTS:

Petitioners brought a class action in the United States District Court against the Board of Education of the City of New York. On June 22, 1971 the court denied a motion for preliminary injunction to prevent the Board of Education and the Chancellor from denying brain-injured children equal educational opportunities, and dismissed the complaint. On December 14, 1971, the United States Court of Appeals for the Second Circuit held that the district court should have retained jurisdiction pending a determination by New York State authorities. Petitioners then instituted a proceding before the Commissioner of the New York State Department of Education.

ALLEGATION

Petitioners were nine children and the New York Association for Brain Injured Children. The proceding was brought on behalf of a class which included all handicapped children in the City School District of New York who were not receiving an appropriate education, in violation of their statutory rights.

The petitioners alleged that they and their class had been subjected to serious and irreparable harm. Allegations included the following:

> . . . failure to evaluate within a reasonable time in order to meet the child's educational needs; failure to place a handicapped child or failure to find a suitable placement; the unavailability of placements in violation of the mandate that education services, facilities and/or programs must be provided for handicapped children; suspension of handicapped children from classes without adequate notice or alternatives; unreasonable lapses of time between placements or between placements and evaluations; failure to endeavor to secure public or private school for a handicapped child placing the burden on parents to search for private school placements: provision of entirely unsuitable home instruction.

DECISION:

The Commissioner found that the class appeal was properly brought, and that there were children whose educational needs were not being met as required by the New York State Education Law, Section 4404. Department investigations revealed the following deficiencies:*

1. Undue delays in examinations and diagnostic procedures.

2. Failure to examine and diagnose handicaps.

3. Failure to place handicapped children in suitable programs.

4. Failure to provide available space and facilities for programs.

5. Children placed on home instruction in violation of the purpose of home instruction.

6. Children placed on home instruction who did not receive the required hours of personal instruction in accordance with the regulations of the Commissioner of Education.

7. Handicapped children expelled from public school education for medical reasons when such medical reasons did not preclude benefits from education settings.

8. Incomplete or conflicting census data on the number of handicapped children residing in New York City.

9. Inadequate means of informing parents of the processes related to special education services, and inadequate plans for parent involvement in effective planning and decision-making regarding their children.

10. Suspensions of handicapped children from classes without adequate notice or provision for alternate educational services.

The Commissioner further found that the Medical Discharge Register was being used as a substitute for the provision of education services, that the functioning of the district committee on the handicapped was a failure, and that the respondents provided home instruction instead of classroom facilities for the handicapped.

DISPOSITION:

The appeal was sustained and the following orders were issued:**

*In the matter of the Appeal of Riley Reid, Decision No. 8742.
**Ibid.

"It is hereby ordered that respondents' "Medical Discharge Register" be discontinued forthwith; and

It is further ordered that all students who have been diagnosed as handicapped be placed immediately in appropriate public school classes or, if public school classes are not available, in private schools under contract in accordance with provisions of Education Law § 4404(2)(b); and

It is further ordered that home instruction be provided by respondents solely in accordance with the provision of Regulations of the Commissioner of Education §200.3(e), and

It is further ordered that the respondents forthwith submit to [the Commissioner] lists of all children being provided home instruction and the reasons for such home instruction; and

It is further ordered that the exemption procedures established under the provision of Regulations of the Commissioner of Education Part 101 be followed with respect to those students who cannot benefit from any instruction; and

It is further ordered that a plan to eliminate waiting lists for diagnosis and placement be submitted to [the Commissioner] by respondents by February 1, 1974; and

It is further ordered that respondents, in consultation with community boards, establish a procedure for regionalizing evaluation of the handicapped not inconsistent with Regulations of the Commissioner of Education §200.2 and submit that procedure to [the Commissioner] by February 1, 1974, and

It is further ordered that respondents undertake a study of the needs of the handicapped on the secondary level and that a plan to meet the needs of those handicapped pupils in the junior and senior high schools be submitted to [the Commissioner] by February 1, 1974, and

It is further ordered that respondents prepare and forward to [the Commissioner] not later than February 1, 1974 a plan for notifying all parents and interested persons, in a language understood by such persons, concerning services available for handicapped children and where advice may be obtained concerning such educational services and to whom complaints may be addressed; and

It is further ordered that jurisdiction of this appeal be retained pending . . . further order [of the Commissioner]."

NOTE:

A motion for enforcement of rights of members of the class, whose education needs were not adequately served, was filed on October 14, 1975 (Appeal No. 9998). The petitioners alleged non-compliance with every aspect of the Commissioner's orders. The Board of Education answered on December 16th, 1975. A decision by the Commissioner is pending.

CASE:

Rhode Island Society for Autistic Children v. Board of Regents for Education of State of Rhode Island, Civ. No. 5081.

COURT AND CASE:

U.S. District Court, Rhode Island, January 22nd, 1973.

ALLEGATION:

This was a class action suit brought on behalf of the 14,000 handicapped children in the State of Rhode Island. The following subclasses were included: "all members of the class who are excluded from publicly supported education; all members of the class who are excluded from regular classes and who have been placed in publicly supported facilities or special classes; and all members of the class who are in regular classrooms but are in need of special education or supplemental educational assistance." The defendants included the Regents and State Departments of Education, Corrections, Social and Rehabilitative Services, and Mental Health, Retardation and Hospitals. The action concerns special education procedures in all Rhode Island school systems and several state institutions.

The plaintiffs alleged that the state had failed to provide an appropriate education to these children and had ignored procedural safeguards in the placement of these children. The plaintiffs further stated that the handicap classifications resulted in a self-fulfilling prophesy, and that handicapped children were both stigmatized and harmed for life.

DISPOSITION:

After a four week trial in September, 1975, a federal judge recessed the case until June, 1976. This hearing date has been postponed until September 27th. A series of agreements have been reached out of court. These stipulations include the following provisions:

- No child may be classified as retarded and or placed as retarded unless he is found to be abnormal in adaptive behavior and has an IQ of below 70 on an individually administered intelligence test, after adjustment for socio-cultural bias and conducted in the home language

- All blacks and children whose home language is other than English will be retested

- Parental permission is required for new and continued special placement, and a due process procedure must be established

- In the case where a child receives six or more hours per week of special education, parents must be given a copy of regulations and memoranda issued as a result of the court agreements

- A state education unit for the handicapped will be established

- A listing of emotionally handicapped and neurologically impaired children with a schedule for the provision of adequate programs must be developed

- Local school districts are required to develop referral systems for diagnostic work-ups

- A pre-school screening program must be implemented.

CASE:

Stewart v. Phillips, Civ. No. 70-1199-F.

COURT AND DATE:

U. S. District Court, Massachusetts, September 14, 1970.

ALLEGATION:

Seven poor children placed in Boston public school classes for the mentally retarded brought a class action suit on behalf of all black and/or low income students in the Boston school system who have been, or may be, misclassified as mentally retarded. After independent psychological examination, the plaintiffs were not found to be retarded.

The defendants included members of the Boston School Committee, the Superintendent, the Director of the Department of Testing and Measurements, the Director of Special Education and the State Commissioner of Mental Health.

The plaintiffs alleged that evaluation and placement procedures were incomplete, not properly evaluated and not rationally related to classification decisions. They claimed that IQ tests were biased and normed on white middle class students, that these tests failed to distinguish among a range of learning disabilities, and were administered by unqualified psychologists. The plaintiffs further alleged that there were no provisions for notice and a hearing prior to classification or placement and that parents were not allowed to review their children's records. According to plaintiffs, children supposedly retarded were segregated from other children, received an inferior education, suffered from lowered self esteem, and were stigmatized for life.

SUBSEQUENT PROCEEDINGS:

On November 30, 1970 defendants filed a motion to dismiss. The court denied this motion. In 1971 the Massachusetts Department of Education and Department of Mental Health issued new regulations concerning special education placement. Subsequently in 1972 the state legislature passed Chapter 766 which established comprehensive evaluation and placement procedures with procedural safeguards. On January 19, 1973 the court denied another motion to dismiss on the basis of new regulations, and the case is still in the discovery stage.

CASE:

Mattie T. v. Johnston, Civ. No. DC-75-31-5.

COURT AND DATE:

U.S. District Court, Northern District, Mississippi, April 25th, 1975.

ALLEGATION:

Twenty-six black handicapped children, who were excluded from basic educational services, brought this class action on behalf of all similarly situated school-aged children in six local school districts and throughout the rest of the State of Mississippi. The defendants included the Mississippi State Superintendent of Public Education, members of the Mississippi State Board of Education, the Supervisor of Special Education Programs of the Mississippi State Department of Education, and the superintendents and members of the Board of Education of the six named local school districts. The plaintiffs' allegations included:

- Failure to provide adequate education to 2,500 handicapped children excluded from school and 20,000 handicapped children placed in regular school programs

- Failure to meet the educational needs of 6,500 handicapped children who were placed in self-contained special classes isolated from the "regular" students

- Failure to provide handicapped children and their parents with procedural safeguards throughout the identification, evaluation and placement processes. (After certification by regional screening teams, children were placed in special classes without notice to parents. No individualized education programs were developed, and no provision for periodic review of placement was made.)

- Failure to use non-discriminatory tests and evaluation procedures to identify and place children in special education programs. (In 1973-74, 76.9 percent of all children in classes for the educable mentally retarded were black, while only 51.7 percent of the State's school population was black.)

Declaratory and injunctive relief was sought under the federal Education for all Handicapped Children Act. The plaintiffs attempt to establish violations of the provisions related to child identification, evaluation and placement, the full services goal, the "least restrictive alternative," non-discriminatory testing and procedural safeguards.

CURRENT STATUS:

The plaintiffs have recently made a motion for summary judgment against the State.

APPENDIX B

THE NEW YORK STATE COMMISSIONER OF EDUCATION'S DECISION IN THE MATTER OF RILEY REID

APPENDIX B

In the Matter of the appeal of RILEY REID, by his mother, Ellen Hoffman; GLEN ANDERSON, by his mother, Vivian Anderson; DU'WAIN BOYCE, by his mother, Joan Boyce; JOSEPH BUTTA, by his father, Dominick Butta; RUSBERTO CANCEL, by his mother, Virginia Cancel; MILDRED GREER, by her mother, Mildred Greer; LOUIS LAMBRECHT, by his mother, Ceil Lambrecht; ALLAN STEVENSON, by his mother, Estelle Stevenson; and the NEW YORK ASSOCIATION FOR BRAIN INJURED CHILDREN and all other children similarly situated from action of the Board of Education of the City School District of the City of New York and Harvey B. Scribner, Chancellor of the City School District of the City of New York, with regard to educational services for handicapped students.

Decision No. 8742

(November 26, 1973)

Carolyn Heft, Esq., attorney for petitioners

Hon. Norman Redlich, Corporation Counsel, attorney for respondents, Joseph Bruno, Esq., of counsel

NYQUIST, Commissioner.—Petitioners brought a proceeding in the United States District Court for the Southern District of New York to determine the rights of petitioners as handicapped students to educational services in respondent district. On June 22, 1971, the court denied petitioners' motion for a preliminary injunction to prevent the Board of Education of the City School District of the City of New York and Harvey B. Scribner, individually and as chancellor, from denying brain-injured children adequate and equal educational opportunities, and granted a cross-motion by defendants to dismiss the complaint. On December 14, 1971, the United States Court of Appeals for the Second Circuit held, in *Matter of Reid et al. v. Bd. of Ed.* (453 F2d 238), that the district court properly abstained from deciding claims based on the United States Constitution pending a determination by New York State authorities as to related but unanswered questions of New York State law, but should have retained jurisdiction pending such a determination. Petitioners then instituted this proceeding before me.

Petitioners are nine named individuals and the New York Association for Brain Injured Children. The proceeding is also brought on behalf of a class which is stated to include all those children in the City School District of the City of New York who are handicapped but, in violation of their statutory rights, are not receiving appropriate educational services. Petitioners include within that class all students who are either attending private or public schools or for whom respondents do not provide suitable educational facilities or programs.

With regard to all the named petitioners, it is alleged that: they were not receiving appropriate educational services in the public school system; they had not been properly examined for the purpose of ascertaining the nature and severity of their handicaps; appropriate recommendations with respect to placement in proper educational programs have not been made; waiting lists existed for screening and subsequent placement; and in the past they were provided with inadequate home instruction during these waiting periods. However, the record now indicates that as of August 1973, all the named petitioners are being provided with appropriate educational services either by respondent school district or by institutions in which they have been placed.

With regard to petitioners' allegations relating to the class described above, I directed the staff of this Department to conduct a detailed and extensive survey in respondent school district. During the months of June and July 1973, an investigation was conducted by the Division for Handicapped Children and the Division of Pupil Personnel Services of the State Education Department. The investigation consisted of interviews with 76 parents of handicapped children, nine community superintendents, 37 principals, 26 professional employees of hospitals and clinics, and representatives of private agencies and employees of the New York City Board of Education. Counsel for petitioners and counsel for respondents were in attendance during these interviews. Additional information was obtained through telephone interviews and in response to written requests. In some instances, information requested from the Office of Special Education and Pupil Personnel Services of the New York City school system was not supplied or was inadequate Approximately 225 man-days were devoted to the investigation by representatives of the State Education Department.

I find that a class appeal is properly brought in this matter, in that there are admittedly numerous children residing within the respondent district whose educational needs are not being adequately served, as required by Education Law §4404, which provides, in subdivision 4:

> 4. The board of education of each school district in which there are ten or more handicapped children who can be grouped homogeneously in the same classroom for instructional purposes shall establish such special classes as may be necessary to provide instruction adapted to the mental attainments of such children from their fifth birthday until the end of the school year during which they attain their twenty-first birthday, or shall contract with the board of education of another school district, a board of cooperative educational services or a vocational education and extension board for the education of such children, under regulations to be established by the commissioner of education.

Regulations of the Commissioner of Education Parts 101, 200 and 203 provide for implementation of this requirement.

The Department's investigations have shown several areas in which respondents have not carried out their obligations as set forth in the law and regulations. In particular, I find that the following deficiencies have existed and continue to exist:

1. Undue delays in examinations and diagnostic procedures.
2. Failure to examine and diagnose handicaps.
3. Failure to place handicapped children in suitable programs.
4. Failure to provide available space and facilities for programs.
5. Children placed on home instruction in violation of the purpose of home instruction.
6. Children placed on home instruction who did not receive the required hours of personal instruction in accordance with the regulations of the Commissioner of Education.
7. Handicapped children expelled from public school education for medical reasons when such medical reasons did not preclude benefits from educational settings.
8. Incomplete or conflicting census data on the number of handicapped children residing in New York City.
9. Inadequate means of informing parents of the processes related to special education services, and inadequate plans for parent involvement in effective planning and decision-making regarding their children.
10. Suspensions of handicapped children from classes without adequate notice or provision for alternate educational services.

With regard to respondents' failure to examine and diagnose handicapped pupils, I have found that a "Medical Discharge Register" has been established by respondents and used as a substitute for providing services for children with handicaps and discipline problems. This register lists children who have been suspended and who are not receiving educational services. Such children may or may not eventually be placed in an appropriate educational program by respondent. It is clear that this type of suspension is not provided for by statute. Suspensions based on discipline problems must be handled in accordance with the provisions of Education Law §3214. Handicapped students must be provided with educational services if they are capable of benefiting from them, or—in the most extreme circumstances—they may be exempted from attendance upon instruction. There is no third alternative, as contemplated by respondents' "Medical Discharge Register."

I further find that the functioning of the committee on the handicapped is a failure in respondent district. To be effective, such committee must function on a regional basis in accordance with a plan developed by respondents in consultation with community boards.

Education Law §4404 clearly expresses the public policy of this State that all handicapped children be provided with adequate educational services. Respondents have, in many instances, re-

sorted to home instruction instead of providing adequate classroom facilities for the handicapped. As noted above, §4404 provides that where 10 or more handicapped students who can be grouped homogeneously require special educational programs, classes must be established for those students. Home instruction should not and may not be used to avoid that mandate. When it has been determined that a handicapped student cannot benefit from class instruction, home instruction may be provided, but only in accordance with the provisions of Regulations of the Commissioner of Education §200.3(e) (*Matter of Valentin*, 10 Ed Dept Rep 53 (1970).

Respondents' failure to provide adequate educational programs for handicapped pupils results in large part from their failure to provide adequate physical facilities and staff for the needed services. Again, the law is clear that respondents must provide the required facilities and staff or contract with private agencies in accordance with Education Law §4404(2)(b).

THE APPEAL IS SUSTAINED.

IT IS HEREBY ORDERED that respondents' "Medical Discharge Register" be discontinued forthwith; and

IT IS FURTHER ORDERED that all students who have been diagnosed as handicapped be placed immediately in appropriate public school classes or, if public school classes are not available, in private schools under contract in accordance with the provisions of Education Law §4404(2)(b); and

IT IS FURTHER ORDERED that home instruction be provided by respondents solely in accordance with the provisions of Regulations of the Commissioner of Education §200.3(e); and

IT IS FURTHER ORDERED that respondents forthwith submit to me lists of all children being provided home instruction and the reasons for such home instruction; and

IT IS FURTHER ORDERED that the exemption procedures established under the provision of Regulations of the Commissioner of Education Part 101 be followed with respect to those students who cannot benefit from any instruction; and

IT IS FURTHER ORDERED that a plan to eliminate waiting lists for diagnosis and placement be submitted to me by respondents by February 1, 1974; and

IT IS FURTHER ORDERED that respondents, in consultation with community boards, establish a procedure for regionalizing

evaluation of the handicapped not inconsistent with Regulations of the Commissioner of Education §200.2 and submit that procedure to me by February 1, 1974; and

IT IS FURTHER ORDERED that respondents undertake a study of the needs of the handicapped on the secondary level and that a plan to meet the needs of those handicapped pupils in the junior and senior high schools be submitted to me by February 1, 1974; and

IT IS FURTHER ORDERED that respondents prepare and forward to me not later than February 1, 1974 a plan for notifying all parents and interested persons, in a language understood by such persons, concerning services available for handicapped children and where advice may be obtained concerning such educational services and to whom complaints may be addressed; and

IT IS FURTHER ORDERED that jurisdiction of this appeal be retained pending my further order.

APPENDIX C

COMPONENTS OF EVALUATION
FOR MENTALLY RETARDED CHILDREN
FROM AN UNDATED STATE OF CALIFORNIA REPORT

APPENDIX C

COMPONENTS OF EVALUATION FOR MENTALLY RETARDED CHILDREN:

FROM AN UNDATED STATE OF CALIFORNIA REPORT

Educational History and School Achievement

- Statements from the pupil's teacher that specify work habits, academic achievements, learning strengths and weaknesses, and situations in which the child has experienced success and failure, and teaching techniques that have been successful or unsuccessful. This report should include a description, in behavioral terms, of the effects of success and failure in the child's school environment, including any inter-personal relationships the pupil had formed.

- Records of academic achievement including scores on group standardized tests.

- Records of communication skills including language development, verbal expression abilities, and written language skills as needed for school success: This should include an investigation of the child's home language skills. "Primary Language" is a language other than English which is the language which the child first learned or the language which is spoken in the child's home environment.

- Reports of any special help programs the pupil may have been in ... previous referrals, retentions, and number of schools attended.

Psychometric Assessment

This area is presently under contention in the Court of Judge Robert Peckham in the Larry P. Case. The Department of Education has taken the position that the use of individual tests of intelligence, i.e., WISC-R, Binet, are extremely useful in helping to make the appropriate selection of pupils who may need and be eligible for special education assistance.

Social, Economic, and Cultural Background

The case study "shall include estimates of adaptive behavior. Until adaptive behavior scales are normed and approved by the State Board of Education, such adaptability testing shall include, but is not limited to, a visit, with the consent of the parent or guardian, to the pupil's home by the school psychologist or a person designated by the chief administrator of the district, upon the recommendation of the school psychologist, and interviews of members of the pupil's family at their home. If the language spoken in the home is other than English, such interviews shall be conducted in the language of the home." (Education Code Section 6902.085).

Definition of Adaptive Behavior

Adaptive behavior refers to an individual's ability to perform successfully in the social roles considered appropriate for his age and sex. Some of the elements included in this phase of the case study may include:

- Language used in the home
- Family mobility
- Occupational history and status of parent
- Sibling relationships
- Isolation of home, family, and child within the environment
- Developmental materials present in the home such as educational toys, books, or reading materials, etc.
- Observations of the home and environment for factors which would be influential upon the educational process.

Developmental History

A developmental history of each pupil would be gathered during conferences with parent and/or guardian. In order to determine a level of mental retardation, the developmental records should reveal significant delays and/or retarded development in such behavior as walking, talking, appropriate affective responses, assumption of responsibility, obedience within the family structure play activities, and peer relationships within the home and in the community.

In connecting the developmental history, standardized instruments such as the Vineland Social Maturity Scale and Gesell's Developmental Schedules may be useful.

Peer Relationships

A study of the minor's present peer, classroom and home relationships to determine if there are such inadequacies as: inability to maintain social roles, lack of friendships with age peers, inability to comprehend and respond to ordinary school and social demands, lack of social involvement in the school and the home.

Health History

A report on the health and physical condition of the minor should include the results of any recent physical examinations. Appropriate recommendations should be made for the remediation of other related health problems. It is important to rule out the possibility that a physical condition is the primary learning handicap. The results of any visual and auditory tests shall be included and shall have been administered within the preceding twelve-month period. Any impairment in sensory and motor functioning should be noted, together with recommendations for educational and physical rehabilitation.

Psychological Adjustment

The minor's overall adjustment and his feelings about himself should be examined by the use of structured observations, check-lists, or other instruments. Pertinent information regarding the minor's self-concept, his level of awareness, his level of aspiration, and preference patterns should be included.

Other pertinent information that would contribute to the recommendations by the admission committee ...

APPENDIX D

THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT OF 1975 (PUBLIC LAW 94-142)

Public Law 94-142
94th Congress, S. 6
November 29, 1975

An Act

To amend the Education of the Handicapped Act to provide educational assistance to all handicapped children, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Education for All Handicapped Children Act of 1975".

Education for All Handicapped Children Act of 1975.
20 USC 1401 note.

EXTENSION OF EXISTING LAW

SEC. 2. (a)(1)(A) Section 611(b)(2) of the Education of the Handicapped Act (20 U.S.C. 1411(b)(2)) (hereinafter in this Act referred to as the "Act"), as in effect during the fiscal years 1976 and 1977, is amended by striking out "the Commonwealth of Puerto Rico,".

(B) Section 611(c)(1) of the Act (20 U.S.C. 1411(c)(1)), as in effect during the fiscal years 1976 and 1977, is amended by striking out "the Commonwealth of Puerto Rico,".

(2) Section 611(c)(2) of the Act (20 U.S.C. 1411(c)(2)), as in effect during the fiscal years 1976 and 1977, is amended by striking out "year ending June 30, 1975" and inserting in lieu thereof the following: "years ending June 30, 1975, and 1976, and for the fiscal year ending September 30, 1977", and by striking out "2 per centum" each place it appears therein and inserting in lieu thereof "1 per centum".

(3) Section 611(d) of the Act (20 U.S.C. 1411(d)), as in effect during the fiscal years 1976 and 1977, is amended by striking out "year ending June 30, 1975" and inserting in lieu thereof the following: "years ending June 30, 1975, and 1976, and for the fiscal year ending September 30, 1977".

(4) Section 612(a) of the Act (20 U.S.C. 1412(a)), as in effect during the fiscal years 1976 and 1977, is amended—

(A) by striking out "year ending June 30, 1975" and inserting in lieu thereof "years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977"; and

(B) by striking out "fiscal year 1974" and inserting in lieu thereof "preceding fiscal year".

(b)(1) Section 614(a) of the Education Amendments of 1974 (Public Law 93-380; 88 Stat. 580) is amended by striking out "fiscal year 1975" and inserting in lieu thereof the following: "the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977,". 20 USC 1411 note.

(2) Section 614(b) of the Education Amendments of 1974 (Public Law 93-380; 88 Stat. 580) is amended by striking out "fiscal year 1974" and inserting in lieu thereof the following: "the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977,". 20 USC 1411 note.

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20 USC 1413 note.

(3) Section 614(c) of the Education Amendments of 1974 (Public Law 93-380; 88 Stat. 580) is amended by striking out "fiscal year 1974" and inserting in lieu thereof the following: "the fiscal years ending June 30, 1975, and 1976, for the period beginning July 1, 1976, and ending September 30, 1976, and for the fiscal year ending September 30, 1977,".

Ante, p. 773.

(c) Section 612(a) of the Act, as in effect during the fiscal years 1976 and 1977, and as amended by subsection (a)(4), is amended by inserting immediately before the period at the end thereof the following: ", or $300,000, whichever is greater".

20 USC 1412.

(d) Section 612 of the Act (20 U.S.C. 1411), as in effect during the fiscal years 1976 and 1977, is amended by adding at the end thereof the following new subsection:

Publication in Federal Register.

"(d) The Commissioner shall, no later than one hundred twenty days after the date of the enactment of the Education for All Handicapped Children Act of 1975, prescribe and publish in the Federal Register such rules as he considers necessary to carry out the provisions of this section and section 611.".

Ante, p. 773.

20 USC 1411 note.

(e) Notwithstanding the provisions of section 611 of the Act, as in effect during the fiscal years 1976 and 1977, there are authorized to be appropriated $100,000,000 for the fiscal year 1976, such sums as may be necessary for the period beginning July 1, 1976, and ending September 30, 1976, and $200,000,000 for the fiscal year 1977, to carry out the provisions of part B of the Act, as in effect during such fiscal years.

STATEMENT OF FINDINGS AND PURPOSE

20 USC 1401 note.

SEC. 3. (a) Section 601 of the Act (20 U.S.C. 1401) is amended by inserting "(a)" immediately before "This title" and by adding at the end thereof the following new subsections:

"(b) The Congress finds that—

"(1) there are more than eight million handicapped children in the United States today;

"(2) the special educational needs of such children are not being fully met;

"(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

"(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

"(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

"(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

"(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

"(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

"(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

"(c) It is the purpose of this Act to assure that all handicapped children have available to them, within the time periods specified in section 612(2)(B), a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.".

Ante, p. 773.

(b) The heading for section 601 of the Act (20 U.S.C. 1401) is amended to read as follows:

"SHORT TITLE; STATEMENT OF FINDINGS AND PURPOSE".

DEFINITIONS

SEC. 4. (a) Section 602 of the Act (20 U.S.C. 1402) is amended— 20 USC 1401.

(1) in paragraph (1) thereof, by striking out "crippled" and inserting in lieu thereof "orthopedically impaired", and by inserting immediately after "impaired children" the following: ", or children with specific learning disabilities.";

(2) in paragraph (5) thereof, by inserting immediately after "instructional materials," the following: "telecommunications, sensory, and other technological aids and devices,";

(3) in the last sentence of paragraph (15) thereof, by inserting immediately after "environmental" the following: ", cultural, or economic"; and

(4) by adding at the end thereof the following new paragraphs:

"(16) The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

"(17) The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

"(18) The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5).

"(19) The term 'individualized education program' means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

"(20) The term 'excess costs' means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this part or under title I or title VII of the Elementary and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this part or under such titles.

20 USC 241a note, 881.

"(21) The term 'native language' has the meaning given that term by section 703(a)(2) of the Bilingual Education Act (20 U.S.C. 880b–1(a)(2)).

"(22) The term 'intermediate educational unit' means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.".

(b) The heading for section 602 of the Act (20 U.S.C. 1402) is amended to read as follows:

"DEFINITIONS".

ASSISTANCE FOR EDUCATION OF ALL HANDICAPPED CHILDREN

SEC. 5. (a) Part B of the Act (20 U.S.C. 1411 et seq.) is amended to read as follows:

"PART B—ASSISTANCE FOR EDUCATION OF ALL HANDICAPPED CHILDREN

"ENTITLEMENTS AND ALLOCATIONS

20 USC 1411. Post, p. 793.

"SEC. 611. (a)(1) Except as provided in paragraph (3) and in section 619, the maximum amount of the grant to which a State is entitled under this part for any fiscal year shall be equal to—

"(A) the number of handicapped children aged three to twenty-one, inclusive, in such State who are receiving special education and related services;

multiplied by—

"(B)(i) 5 per centum, for the fiscal year ending September 30, 1978, of the average per pupil expenditure in public elementary and secondary schools in the United States;

"(ii) 10 per centum, for the fiscal year ending September 30, 1979, of the average per pupil expenditure in public elementary and secondary schools in the United States;

"(iii) 20 per centum, for the fiscal year ending September 30, 1980, of the average per pupil expenditure in public elementary and secondary schools in the United States;

"(iv) 30 per centum, for the fiscal year ending September 30, 1981, of the average per pupil expenditure in public elementary and secondary schools in the United States; and

"(v) 40 per centum, for the fiscal year ending September 30, 1982, and for each fiscal year thereafter, of the average per pupil expenditure in public elementary and secondary schools in the United States;

except that no State shall receive an amount which is less than the amount which such State received under this part for the fiscal year ending September 30, 1977.

"(2) For the purpose of this subsection and subsection (b) through subsection (e), the term 'State' does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands. "State."

"(3) The number of handicapped children receiving special education and related services in any fiscal year shall be equal to the average of the number of such children receiving special education and related services on October 1 and February 1 of the fiscal year preceding the fiscal year for which the determination is made.

"(4) For purposes of paragraph (1)(B), the term 'average per pupil expenditure', in the United States, means the aggregate current expenditures, during the second fiscal year preceding the fiscal year for which the computation is made (or, if satisfactory data for such year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for purposes of this subsection, means the fifty States and the District of Columbia), as the case may be, plus any direct expenditures by the State for operation of such agencies (without regard to the source of funds from which either of such expenditures are made), divided by the aggregate number of children in average daily attendance to whom such agencies provided free public education during such preceding year. "Average per pupil expenditure."

"(5)(A) In determining the allotment of each State under paragraph (1), the Commissioner may not count—

"(i) handicapped children in such State under paragraph (1)(A) to the extent the number of such children is greater than 12 per centum of the number of all children aged five to seventeen, inclusive, in such State;

"(ii) as part of such percentage, children with specific learning disabilities to the extent the number of such children is greater than one-sixth of such percentage; and

"(iii) handicapped children who are counted under section 121 of the Elementary and Secondary Education Act of 1965. 20 USC 241c-1.

"(B) For purposes of subparagraph (A), the number of children aged five to seventeen, inclusive, in any State shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him.

"(b)(1) Of the funds received under subsection (a) by any State for the fiscal year ending September 30, 1978—

"(A) 50 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

"(B) 50 per centum of such funds shall be distributed by such State pursuant to subsection (d) to local educational agencies and intermediate educational units in such State, for use in accordance with the priorities established under section 612(3).

"(2) Of the funds which any State may use under paragraph (1)(A)—

"(A) an amount which is equal to the greater of—

"(i) 5 per centum of the total amount of funds received under this part by such State; or

"(ii) $200,000;

may be used by such State for administrative costs related to carrying out sections 612 and 613;

"(B) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 612(3).

"(c)(1) Of the funds received under subsection (a) by any State for the fiscal year ending September 30, 1979, and for each fiscal year thereafter—

"(A) 25 per centum of such funds may be used by such State in accordance with the provisions of paragraph (2); and

"(B) except as provided in paragraph (3), 75 per centum of such funds shall be distributed by such State pursuant to subsection (d) to local educational agencies and intermediate educational units in such State, for use in accordance with priorities established under section 612(3).

"(2)(A) Subject to the provisions of subparagraph (B), of the funds which any State may use under paragraph (1)(A)—

"(i) an amount which is equal to the greater of—

"(I) 5 per centum of the total amount of funds received under this part by such State; or

"(II) $200,000;

may be used by such State for administrative costs related to carrying out the provisions of sections 612 and 613; and

"(ii) the remainder shall be used by such State to provide support services and direct services, in accordance with the priorities established under section 612(3).

"(B) The amount expended by any State from the funds available to such State under paragraph (1)(A) in any fiscal year for the provision of support services or for the provision of direct services shall be matched on a program basis by such State, from funds other than Federal funds, for the provision of support services or for the provision of direct services for the fiscal year involved.

"(3) The provisions of section 613(a)(9) shall not apply with respect to amounts available for use by any State under paragraph (2).

"(4)(A) No funds shall be distributed by any State under this subsection in any fiscal year to any local educational agency or intermediate educational unit in such State if—

"(i) such local educational agency or intermediate educational unit is entitled, under subsection (d), to less than $7,500 for such fiscal year; or

"(ii) such local educational agency or intermediate educational unit has not submitted an application for such funds which meets the requirements of section 614.

"(B) Whenever the provisions of subparagraph (A) apply, the State involved shall use such funds to assure the provision of a free appropriate education to handicapped children residing in the area served by such local educational agency or such intermediate educational unit. The provisions of paragraph (2)(B) shall not apply to the use of such funds.

"(d) From the total amount of funds available to local educational agencies and intermediate educational units in any State under subsection (b)(1)(B) or subsection (c)(1)(B), as the case may be, each local educational agency or intermediate educational unit shall be entitled to an amount which bears the same ratio to the total amount available under subsection (b)(1)(B) or subsection (c)(1)(B), as the case may be, as the number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in such local educational agency or intermediate educational unit bears to the aggregate number of handicapped children aged three to twenty-one, inclusive, receiving special education and related services in all local educational agencies and intermediate educational units which apply to the State educational agency involved for funds under this part.

"(e)(1) The jurisdictions to which this subsection applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

"(2) Each jurisdiction to which this subsection applies shall be entitled to a grant for the purposes set forth in section 601(c) in an amount equal to an amount determined by the Commissioner in accordance with criteria based on respective needs, except that the aggregate of the amount to which such jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 per centum of the aggregate of the amounts available to all States under this part for that fiscal year. If the aggregate of the amounts, determined by the Commissioner pursuant to the preceding sentence, to be so needed for any fiscal year exceeds an amount equal to such 1 per centum limitation, the entitlement of each such jurisdiction shall be reduced proportionately until such aggregate does not exceed such 1 per centum limitation. Ante, p. 774.

"(3) The amount expended for administration by each jurisdiction under this subsection shall not exceed 5 per centum of the amount allotted to such jurisdiction for any fiscal year, or $35,000, whichever is greater.

"(f)(1) The Commissioner is authorized to make payments to the Secretary of the Interior according to the need for such assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior. The amount of such payment for any fiscal year shall not exceed 1 per centum of the aggregate amounts available to all States under this part for that fiscal year.

"(2) The Secretary of the Interior may receive an allotment under this subsection only after submitting to the Commissioner an application which meets the applicable requirements of section 614(a) and which is approved by the Commissioner. The provisions of section 616 shall apply to any such application.

"(g)(1) If the sums appropriated for any fiscal year for making payments to States under this part are not sufficient to pay in full the total amounts which all States are entitled to receive under this part for such fiscal year, the maximum amounts which all States are entitled to receive under this part for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

"(2) In the case of any fiscal year in which the maximum amounts for which States are eligible have been reduced under the first sentence of paragraph (1), and in which additional funds have not been made available to pay in full the total of such maximum amounts under the last sentence of such paragraph, the State educational agency shall fix dates before which each local educational agency or intermediate educational unit shall report to the State educational agency on the amount of funds available to the local educational agency or intermediate educational unit, under the provisions of subsection (d), which it estimates that it will expend in accordance with the provisions of this part. The amounts so available to any local educational agency or intermediate educational unit, or any amount which would be available to any other local educational agency or intermediate educational unit if it were to submit a program meeting the requirements of this part, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies or intermediate educational units, in the manner provided by this section, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

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"ELIGIBILITY

20 USC 1412.

"SEC. 612. In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

"(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

"(2) The State has developed a plan pursuant to section 613(b) in effect prior to the date of the enactment of the Education for All Handicapped Children Act of 1975 and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

"(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

"(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such require-

ments would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

"(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

"(D) policies and procedures are established in accordance with detailed criteria prescribed under section 617(c); and

"(E) the amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Commissioner.

"(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

"(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 614(a)(5).

"(5) The State has established (A) procedural safeguards as required by section 615, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

"(6) The State educational agency shall be responsible for assuring that the requirements of this part are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency. Administration.

Notice, hearings.

"(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 613.

"STATE PLANS

20 USC 1413.

"SEC. 613. (a) Any State meeting the eligibility requirements set forth in section 612 and desiring to participate in the program under this part shall submit to the Commissioner, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall—

"(1) set forth policies and procedures designed to assure that funds paid to the State under this part will be expended in accordance with the provisions of this part, with particular attention given to the provisions of sections 611(b), 611(c), 611(d), 612(2), and 612(3);

"(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including section 121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241c–2), section 305(b)(8) of such Act (20 U.S.C. 844a (b)(8)) or its successor authority, and section 122(a)(4)(B) of the Vocational Education Act of 1963 (20 U.S.C. 1262(a)(4)(B)), under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

20 USC 241c-1.

"(3) set forth, consistent with the purposes of this Act, a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the inservice training of general and special educational instructional and support personnel, detailed procedures to assure that all personnel necessary to carry out the purposes of this Act are appropriately and adequately prepared and trained, and effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and (B) adopting, where appropriate, promising educational practices and materials development through such projects;

"(4) set forth policies and procedures to assure—

"(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this part by providing for such children special education and related services; and

"(B) that (i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this part) at no cost to their parents or guardian, if such children are placed in or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this part or any other applicable law requiring the provision of special education and related services to all handicapped children within such State, and (ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

"(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this part for services to any child who is determined to be erroneously classified as eligible to be counted under section 611(a) or section 611(d);

"(6) provide satisfactory assurance that the control of funds provided under this part, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this part, and that a public agency will administer such funds and property;

Reports and records.

"(7) provide for (A) making such reports in such form and containing such information as the Commissioner may require to carry out his functions under this part, and (B) keeping such records and affording such access thereto as the Commissioner may find necessary to assure the correctness and verification of such reports and proper disbursement of Federal funds under this part;

Notice, hearings.

"(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

"(9) provide satisfactory assurance that Federal funds made available under this part (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of State and local funds expended for the education of handicapped children and in no case to supplant such State and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement of this clause if he concurs with the evidence provided by the State;

"(10) provide, consistent with procedures prescribed pursuant to section 617(a)(2), satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this part to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

Evaluation.

"(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Commissioner shall prescribe pursuant to section 617; and

State advisory panel.

"(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the State in the education of handicapped children, (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this part, and (C) assists the State in developing and reporting such data and evaluations as may assist the Commissioner in the performance of his responsibilities under section 618.

"(b) Whenever a State educational agency provides free appropriate public education for handicapped children, or provides direct services to such children, such State educational agency shall include, as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) as are contained in section 614(a), except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 614(a).

"(c) The Commissioner shall approve any State plan and any modification thereof which—

"(1) is submitted by a State eligible in accordance with section 612; and

"(2) meets the requirements of subsection (a) and subsection (b).

Notice, hearings.

The Commissioner shall disapprove any State plan which does not meet the requirements of the preceding sentence, but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

"APPLICATION

20 USC 1414.

"SEC. 614. (a) A local educational agency or an intermediate educational unit which desires to receive payments under section 611(d) for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall—

"(1) provide satisfactory assurance that payments under this part will be used for excess costs directly attributable to programs which—

"(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

"(B) establish policies and procedures in accordance with detailed criteria prescribed under section 617(c);

"(C) establish a goal of providing full educational opportunities to all handicapped children, including—

"(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 613(a)(3);

"(ii) the provision of, and the establishment of priorities for providing, a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

"(iii) the participation and consultation of the parents or guardian of such children; and

"(iv) to the maximum extent practicable and consistent with the provisions of section 612(5)(B), the provision of special services to enable such children to participate in regular educational programs;

"(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

"(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

"(2) provide satisfactory assurance that (A) the control of funds provided under this part, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this part, and that a public agency will administer such funds and property, (B) Federal funds expended by local educational agencies and intermediate educational units for programs under this part (i) shall be used to pay only the excess costs directly attributable to the education of handicapped children, and (ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds, and (C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas which, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction which are not receiving funds under this part;

"(3)(A) provide for furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this part, including information relating to the educational achievement of handicapped children participating in programs carried out under this part; and

"(B) provide for keeping such records, and provide for affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subclause (A); Recordkeeping.

"(4) provide for making the application and all pertinent documents related to such application available to parents, guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information; Public information, availability.

"(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

"(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 612 and section 613(a); and

"(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 612(5)(B), 612(5)(C), and 615.

Application approval.

"(b)(1) A State educational agency shall approve any application submitted by a local educational agency or an intermediate educational unit under subsection (a) if the State educational agency determines that such application meets the requirements of subsection (a), except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) is approved by the Commissioner under section 613(c). A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) if the State educational agency determines that such application does not meet the requirements of subsection (a).

Notice, hearing.

"(2)(A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall—

"(i) make no further payments to such local educational agency or such intermediate educational unit under section 620 until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

"(ii) take such finding into account in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a).

"(B) The provisions of the last sentence of section 616(a) shall apply to any local educational agency or any intermediate educational unit receiving any notification from a State educational agency under this paragraph.

"(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 615 which is adverse to the local educational agency or intermediate educational unit involved in such decision.

"(c)(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible

to receive payments because of the application of section 611(c)(4)(A)(i) or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

"(2)(A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agencies may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 611(d) if an individual application of any such local educational agency had been approved.

Rules and regulations.

"(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 612 and section 613(a) and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this part.

"(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this part, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

"(d) Whenever a State educational agency determines that a local educational agency—

"(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a);

"(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

"(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this part.

Funds, reallocation.

"(e) Whenever a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 611(d), to such other local educational agencies within the State as are not adequately providing special education and related services to all handicapped children residing in the areas served by such other local educational agencies.

"(f) Notwithstanding the provisions of subsection (a)(2)(B)(ii), any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 611(d) for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

"PROCEDURAL SAFEGUARDS

20 USC 1415.

"SEC. 615. (a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this part shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

"(b)(1) The procedures required by this section shall include, but shall not be limited to—

"(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

"(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

"(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

"(i) proposes to initiate or change, or

"(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

"(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

"(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

Hearing.

"(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

"(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

"(d) Any party to any hearing conducted pursuant to subsections (b) and (c) shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 613(a)(12)).

"(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) shall be final, except that any party may bring an action under paragraph (2) of this subsection.

Civil action.

"(2) Any party aggrieved by the findings and decision made under subsection (b) who does not have the right to an appeal under subsection (c), and any party aggrieved by the findings and decision under subsection (c), shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

"(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

District courts jurisdiction.

"(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

"WITHHOLDING AND JUDICIAL REVIEW

Notice, hearing. 20 USC 1416.

"SEC. 616. (a) Whenever the Commissioner, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds—

"(1) that there has been a failure to comply substantially with any provision of section 612 or section 613, or

"(2) that in the administration of the State plan there is a failure to comply with any provision of this part or with any requirements set forth in the application of a local educational agency or intermediate educational unit approved by the State educational agency pursuant to the State plan,

the Commissioner (A) shall, after notifying the State educational agency, withhold any further payments to the State under this part, and (B) may, after notifying the State educational agency, withhold further payments to the State under the Federal programs specified in section 613(a)(2) within his jurisdiction, to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children. If the Commissioner withholds further payments under clause (A) or clause (B) he may determine that such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this part to specified local educational agencies or intermediate educational units affected by the failure. Until the Commissioner is satisfied that there is no longer any failure to comply with the provisions of this part, as specified in clause (1) or clause (2), no further payments shall be made to the State under this part or under the Federal programs specified in section 613(a)(2) within his jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children, or payments by the State educational agency under this part shall be limited to local educational agencies and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency or unit.

Petition for review.

"(b)(1) If any State is dissatisfied with the Commissioner's final action with respect to its State plan submitted under section 613, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of title 28, United States Code.

"(2) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

"(3) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

"ADMINISTRATION

"SEC. 617. (a)(1) In carrying out his duties under this part, the Commissioner shall— 20 USC 1417.

"(A) cooperate with, and furnish all technical assistance necessary, directly or by grant or contract, to the States in matters relating to the education of handicapped children and the execution of the provisions of this part;

"(B) provide such short-term training programs and institutes as are necessary;

"(C) disseminate information, and otherwise promote the education of all handicapped children within the States; and

"(D) assure that each State shall, within one year after the date of the enactment of the Education for All Handicapped Children Act of 1975, provide certification of the actual number of handicapped children receiving special education and related services in such State.

"(2) As soon as practicable after the date of the enactment of the Education for All Handicapped Children Act of 1975, the Commissioner shall, by regulation, prescribe a uniform financial report to be utilized by State educational agencies in submitting State plans under this part in order to assure equity among the States. Regulations.

"(b) In carrying out the provisions of this part, the Commissioner (and the Secretary, in carrying out the provisions of subsection (c)) shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

"(c) The Secretary shall take appropriate action, in accordance with the provisions of section 438 of the General Education Provisions Act, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Commissioner and by State and local educational agencies pursuant to the provisions of this part. 20 USC 1232g.

"(d) The Commissioner is authorized to hire qualified personnel necessary to conduct data collection and evaluation activities required by subsections (b), (c) and (d) of section 618 and to carry out his duties under subsection (a)(1) of this subsection without regard to the provisions of title 5, United States Code, relating to appointments in the competitive service and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and general schedule pay rates except that no more than twenty such personnel shall be employed at any time. 5 USC 5101, 5331.

"EVALUATION

"SEC. 618. (a) The Commissioner shall measure and evaluate the impact of the program authorized under this part and the effectiveness of State efforts to assure the free appropriate public education of all handicapped children. 20 USC 1418.

"(b) The Commissioner shall conduct, directly or by grant or contract, such studies, investigations, and evaluations as are necessary to assure effective implementation of this part. In carrying out his responsibilities under this section, the Commissioner shall—

"(1) through the National Center for Education Statistics, provide to the appropriate committees of each House of the Congress and to the general public at least annually, and shall update at least annually, programmatic information concerning programs and projects assisted under this part and other Federal programs

supporting the education of handicapped children, and such information from State and local educational agencies and other appropriate sources necessary for the implementation of this part, including—

"(A) the number of handicapped children in each State, within each disability, who require special education and related services;

"(B) the number of handicapped children in each State, within each disability, receiving a free appropriate public education and the number of handicapped children who need and are not receiving a free appropriate public education in each such State;

"(C) the number of handicapped children in each State, within each disability, who are participating in regular educational programs, consistent with the requirements of section 612(5)(B) and section 614(a)(1)(C)(iv), and the number of handicapped children who have been placed in separate classes or separate school facilities, or who have been otherwise removed from the regular education environment;

"(D) the number of handicapped children who are enrolled in public or private institutions in each State and who are receiving a free appropriate public education, and the number of handicapped children who are in such institutions and who are not receiving a free appropriate public education;

"(E) the amount of Federal, State, and local expenditures in each State specifically available for special education and related services; and

"(F) the number of personnel, by disability category, employed in the education of handicapped children, and the estimated number of additional personnel needed to adequately carry out the policy established by this Act; and

"(2) provide for the evaluation of programs and projects assisted under this part through—

"(A) the development of effective methods and procedures for evaluation;

"(B) the testing and validation of such evaluation methods and procedures; and

"(C) conducting actual evaluation studies designed to test the effectiveness of such programs and projects.

"(c) In developing and furnishing information under subclause (E) of clause (1) of subsection (b), the Commissioner may base such information upon a sampling of data available from State agencies, including the State educational agencies, and local educational agencies.

Report, transmittal to congressional committees.

"(d)(1) Not later than one hundred twenty days after the close of each fiscal year, the Commissioner shall transmit to the appropriate committees of each House of the Congress a report on the progress being made toward the provision of free appropriate public education to all handicapped children, including a detailed description of all evaluation activities conducted under subsection (b).

Contents.

"(2) The Commissioner shall include in each such report—

"(A) an analysis and evaluation of the effectiveness of procedures undertaken by each State educational agency, local educational agency, and intermediate educational unit to assure that handicapped children receive special education and related services in the least restrictive environment commensurate with their needs and to improve programs of instruction for handicapped children in day or residential facilities;

"(B) any recommendations for change in the provisions of this part, or any other Federal law providing support for the education of handicapped children; and

"(C) an evaluation of the effectiveness of the procedures undertaken by each such agency or unit to prevent erroneous classification of children as eligible to be counted under section 611, including actions undertaken by the Commissioner to carry out provisions of this Act relating to such erroneous classification.

In order to carry out such analyses and evaluations, the Commissioner shall conduct a statistically valid survey for assessing the effectiveness of individualized educational programs.

"(e) There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section. Appropriation authorization.

"INCENTIVE GRANTS

"SEC. 619. (a) The Commissioner shall make a grant to any State which— 20 USC 1419.

"(1) has met the eligibility requirements of section 612;

"(2) has a State plan approved under section 613; and

"(3) provides special education and related services to handicapped children aged three to five, inclusive, who are counted for the purposes of section 611(a)(1)(A).

The maximum amount of the grant for each fiscal year which a State may receive under this section shall be $200 for each such child in that State.

"(b) Each State which—

"(1) has met the eligibility requirements of section 612,

"(2) has a State plan approved under section 613, and

"(3) desires to receive a grant under this section,

shall make an application to the Commissioner at such time, in such manner, and containing or accompanied by such information, as the Commissioner may reasonably require.

"(c) The Commissioner shall pay to each State having an application approved under subsection (b) of this section the amount to which the State is entitled under this section, which amount shall be used for the purpose of providing the services specified in clause (3) of subsection (a) of this section.

"(d) If the sums appropriated for any fiscal year for making payments to States under this section are not sufficient to pay in full the maximum amounts which all States may receive under this part for such fiscal year, the maximum amounts which all States may receive under this part for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

"(e) In addition to the sums necessary to pay the entitlements under section 611, there are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section. Appropriation authorization.

"PAYMENTS

"SEC. 620. (a) The Commissioner shall make payments to each State in amounts which the State educational agency of such State is eligible to receive under this part. Any State educational agency receiving payments under this subsection shall distribute payments 20 USC 1420.

to the local educational agencies and intermediate educational units of such State in amounts which such agencies and units are eligible to receive under this part after the State educational agency has approved applications of such agencies or units for payments in accordance with section 614(b).

"(b) Payments under this part may be made in advance or by way of reimbursement and in such installments as the Commissioner may determine necessary.".

Regulations. 20 USC 1411 note.

(b) (1) The Commissioner of Education shall, no later than one year after the effective date of this subsection, prescribe—

(A) regulations which establish specific criteria for determining whether a particular disorder or condition may be considered a specific learning disability for purposes of designating children with specific learning disabilities;

(B) regulations which establish and describe diagnostic procedures which shall be used in determining whether a particular child has a disorder or condition which places such child in the category of children with specific learning disabilities; and

(C) regulations which establish monitoring procedures which will be used to determine if State educational agencies, local educational agencies, and intermediate educational units are complying with the criteria established under clause (A) and clause (B).

Proposed regulation, submittal to congressional committees. Publication in Federal Register.

(2) The Commissioner shall submit any proposed regulation written under paragraph (1) to the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Public Welfare of the Senate, for review and comment by each such committee, at least fifteen days before such regulation is published in the Federal Register.

(3) If the Commissioner determines, as a result of the promulgation of regulations under paragraph (1), that changes are necessary in the definition of the term "children with specific learning disabilities", as such term is defined by section 602(15) of the Act, he shall submit recommendations for legislation with respect to such changes to each House of the Congress.

20 USC 402.

Definitions.

(4) For purposes of this subsection:

(A) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or environmental, cultural, or economic disadvantage.

(B) The term "Commissioner" means the Commissioner of Education.

20 USC 1411.

(c) Effective on the date upon which final regulations prescribed by the Commissioner of Education under subsection (b) take effect, the amendment made by subsection (a) is amended, in subparagraph (A) of section 611(a)(5) (as such subparagraph would take effect on the effective date of subsection (a)), by adding "and" at the end of clause (i), by striking out clause (ii), and by redesignating clause (iii) as clause (ii).

AMENDMENTS WITH RESPECT TO EMPLOYMENT OF HANDICAPPED INDIVIDUALS, REMOVAL OF ARCHITECTURAL BARRIERS, AND MEDIA CENTERS

SEC. 6. (a) Part A of the Act is amended by inserting after section 605 thereof the following new sections: 20 USC 1404.

"EMPLOYMENT OF HANDICAPPED INDIVIDUALS

"SEC. 606. The Secretary shall assure that each recipient of assistance under this Act shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this Act. 20 USC 1405.

"GRANTS FOR THE REMOVAL OF ARCHITECTURAL BARRIERS

"SEC. 607. (a) Upon application by any State or local educational agency or intermediate educational unit the Commissioner is authorized to make grants to pay part or all of the cost of altering existing buildings and equipment in the same manner and to the same extent as authorized by the Act approved August 12, 1968 (Public Law 90-480), relating to architectural barriers. 20 USC 1406.

"(b) For the purpose of carrying out the provisions of this section, there are authorized to be appropriated such sums as may be necessary.". Appropriation authorization.

(b) Section 653 of the Act (20 U.S.C. 1453) is amended to read as follows:

"CENTERS ON EDUCATIONAL MEDIA AND MATERIALS FOR THE HANDICAPPED

"SEC. 653. (a) The Secretary is authorized to enter into agreements with institutions of higher education, State and local educational agencies, or other appropriate nonprofit agencies, for the establishment and operation of centers on educational media and materials for the handicapped, which together will provide a comprehensive program of activities to facilitate the use of new educational technology in education programs for handicapped persons, including designing, developing, and adapting instructional materials, and such other activities consistent with the purposes of this part as the Secretary may prescribe in such agreements. Any such agreement shall—

"(1) provide that Federal funds paid to a center will be used solely for such purposes as are set forth in the agreement; and

"(2) authorize the center involved, subject to prior approval by the Secretary, to contract with public and private agencies and organizations for demonstration projects.

"(b) In considering proposals to enter into agreements under this section, the Secretary shall give preference to institutions and agencies—

"(1) which have demonstrated the capabilities necessary for the development and evaluation of educational media for the handicapped; and

"(2) which can serve the educational technology needs of the Model High School for the Deaf (established under Public Law 89-694). 80 Stat. 1027.

"(c) The Secretary shall make an annual report on activities carried out under this section which shall be transmitted to the Congress.". Report to Congress.

CONGRESSIONAL DISAPPROVAL OF REGULATIONS

SEC. 7. (a)(1) Section 431(d)(1) of the General Education Provisions Act (20 U.S.C. 1232(d)(1)) is amended by inserting "final" immediately before "standard" each place it appears therein.

(2) The third sentence of section 431(d)(2) of such Act (20 U.S.C. 1232(d)(2)) is amended by striking out "proposed" and inserting in lieu thereof "final".

(3) The fourth and last sentences of section 431(d)(2) of such Act (20 U.S.C. 1232(d)(2)) each are amended by inserting "final" immediately before "standard".

(b) Section 431(d)(1) of the General Education Provisions Act (20 U.S.C. 1232(d)(1)) is amended by adding at the end thereof the following new sentence: "Failure of the Congress to adopt such a concurrent resolution with respect to any such final standard, rule, regulation, or requirement prescribed under any such Act, shall not represent, with respect to such final standard, rule, regulation, or requirement, an approval or finding of consistency with the Act from which it derives its authority for any purpose, nor shall such failure to adopt a concurrent resolution be construed as evidence of an approval or finding of consistency necessary to establish a prima facie case, or an inference or presumption, in any judicial proceeding.".

EFFECTIVE DATES

20 USC 1411 note.

SEC. 8. (a) Notwithstanding any other provision of law, the amendments made by sections 2(a), 2(b), and 2(c) shall take effect on July 1, 1975. | 151 |

(b) The amendments made by sections 2(d), 2(e), 3, 6, and 7 shall take effect on the date of the enactment of this Act.

(c) The amendments made by sections 4 and 5(a) shall take effect on October 1, 1977, except that the provisions of clauses (A), (C), (D), and (E) of paragraph (2) of section 612 of the Act, as amended by this Act, section 617(a)(1)(D) of the Act, as amended by this Act, section 617(b) of the Act, as amended by this Act, and section 618(a) of the Act, as amended by this Act, shall take effect on the date of the enactment of this Act.

(d) The provisions of section 5(b) shall take effect on the date of the enactment of this Act.

Approved November 29, 1975.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 94-332 accompanying H.R. 7217 (Comm. on Education and Labor) and 94-664 (Comm. of Conference).

SENATE REPORTS: No. 94-168 (Comm. on Labor and Public Welfare) and No. 94-455 (Comm. of Conference).

CONGRESSIONAL RECORD, Vol. 121 (1975):

June 18, considered and passed Senate.

July 21, 29, considered and passed House, amended, in lieu of H.R. 7217.

Nov. 18, House agreed to conference report.

Nov. 19, Senate agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 11, No. 49:

Dec. 2, Presidential statement.

APPENDIX E

HEW/OCR MEMORANDUM TO LOCAL SCHOOL DISTRICTS
REGARDING THE IDENTIFICATION OF DISCRIMINATION
IN THE ASSIGNMENT OF CHILDREN
TO SPECIAL EDUCATION PROGRAMS

APPENDIX E

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

AUGUST 1975

MEMORANDUM FOR CHIEF STATE SCHOOL OFFICERS
AND LOCAL SCHOOL DISTRICT SUPERINTENDENTS

SUBJECT: Identification of Discrimination in the Assignment of Children to Special Education Programs

Title VI of the Civil Rights Act 1964 and the Departmental Regulation (45 CFR Part 80) promulgated thereunder require that there be no discrimination on the basis of race, color, or national origin in the operation of any programs benefiting from Federal financial assistance. Similarly, Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education programs or activities benefiting from Federal financial assistance.

Compliance reviews conducted by the Office for Civil Rights have revealed a number of common practices which have the effect of denying equality of educational opportunity on the basis of race, color, national origin, or sex in the assignment of children to special education programs.

As used herein, the term "special education programs" refers to any class or instructional program operated by a State or local education agency to meet the needs of children with any mental, physical, or emotional exceptionality including, but not limited to, children who are mentally retarded, gifted and talented, emotionally disturbed or socially maladjusted, hard of hearing, deaf, speech-impaired, visually handicapped, orthopedically handicapped, or to children with other health impairments or specific learning disabilities.

The disproportionate over- or underinclusion of children of any race, color, national origin, or sex in any special program category may indicate possible noncompliance with Title VI or Title IX. In addition, evidence of the utilization of criteria or methods of referral, placement or treatment of students in any special education program which have the effect of subjecting individuals to discrimination because of race, color, national origin, or sex may also constitute noncompliance with Title VI and Title IX.

In developing its standards for Title VI and Title IX compliance in the area of special education, the Office for Civil Rights has carefully reviewed

many of the requirements for State plans contained in Section 613 of the Education Amendments of 1974 (P.L. 93-380), which amended Part B of the Education of the Handicapped Act.

Based on the above, any one or more of the following practices may constitute a violation of Title VI or Title IX where there is an adverse impact on children of one or more racial or national origin groups or on children of one sex:

1. Failure to establish and implement uniform nondiscriminatory criteria for the referral of students for possible placement in special education programs.

2. Failure to adopt and implement uniform procedures for insuring that children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation, and educational placement including, but not limited to the following:

   a. prior written and oral notice to parents or guardians in their primary language whenever the local or State education agency proposes to change the educational placement of the child, including a full explanation of the nature and implications of such proposed change;

   b. an opportunity for the parents or guardians to obtain an impartial due process hearing, examine all relevant records with respect to the classification of the child, and obtain an independent educational evaluation of the child;

   c. procedures to protect the rights of the child when the parents or guardians are not known, unavailable, or the child is a ward of the State, including the assignment of an individual, who is not an employee of the State or local educational agency involved in the education of children, to act as a surrogate for the parents or guardians;

   d. provisions to insure that the decisions rendered in the impartial due process hearing referred to in part (b) above shall be binding on all parties, subject only to appropriate administrative or judicial appeal; and

e. procedures to insure that, to the maximum extent appropriate, exceptional children are educated with children who are not exceptional and that special classes, separate schooling, or other removal of exceptional children from the regular education environment occur only when the nature or severity of the exceptionality is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily.

3. Failure to adopt and implement procedures to insure that test materials and other assessment devices used to identify, classify and place exceptional children are selected and administered in a manner which is non-discriminatory in its impact on children of any race, color, national origin or sex.

   Such testing and evaluation materials and procedures must be equally appropriate for children of all racial and ethnic groups being considered for placement in special education classes. In that regard procedures and tests must be used which measure and evaluate equally well all significant factors related to the learning process, including but not limited to consideration of sensorimotor, physical, socio-cultural and intellectual development, as well as adaptive behavior. Adaptive behavior is the effectiveness or degree with which the individual meets the standards of personal independence and social responsibility expected of her or his age and cultural group. Accordingly, where present testing and evaluation materials and procedures have an adverse impact on members of a particular race, national origin, or sex, additional or substitute materials and procedures which do not have such an adverse impact must be employed before placing such children in a special education program.

4. Failure to assess individually each student's needs and assign her or him to a program designed to meet those individually identified needs.

5. Failure to adopt and implement uniform procedures with respect to the comprehensive reevaluation at least once a year of students participating in special education programs.

6. Failure to take steps to assure that special education programs will be equally effective for children of all cultural and linguistic backgrounds.

School officials should examine current practices in their districts to assess compliance with the matters set forth in this memorandum. A school district which determines that compliance problems currently exist in that district should immediately devise and implement a plan of remediation. Such a plan must not only include the redesign of a program or programs to conform to the above outlined practices, but also the provision of necessary reassessment or procedural opportunities for those students currently assigned to special education programs in a way contrary to the practices outlined. All students who have been inappropriately placed in a special education program in violation of Title VI or Title IX requirements must be reassigned to an appropriate program and provided with whatever assistance may be necessary to foster their performance in that program, including assistance to compensate for the detrimental effects of improper placement.

Some of the practices which may constitute a violation of Title VI or Title IX may also violate Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112), as amended by the Rehabilitation Act of 1973 (P.L. 93-516) which prohibits discrimination on the basis of handicap; and other practices not addressed by this memorandum and not currently prohibited by Title VI or Title IX may be prohibited by that Section. The Office for Civil Rights is currently formulating the regulation to implement Section 504.

School districts have a continuing responsibility to abide by this memorandum in order to remain in compliance with Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.

Martin Gerry

Martin Gerry
Acting Director
Office for Civil Rights

APPENDIX F

AMENDMENT TO REGULATIONS OF
THE COMMISSIONER OF EDUCATION
PURSUANT TO SECTIONS 207 AND 4403
OF THE NEW YORK STATE EDUCATION LAW

APPENDIX F

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION
Pursuant to Section 207 and 4403 of the Education Law

The Regulations of the Commissioner of Education are amended by the repeal of Part 200 thereof, and the addition of new Part 200, effective November 1, 1976, to read as follows:

Part 200 Handicapped Children

Section 200.1 Definitions (a) Alternate learning center means a public education program which operates separately from the regular public school facility in order to offer a comprehensive educational program for an identified population of severely handicapped children.

(b) Appropriate specialist means one who is qualified to offer expert advice and assistance relative to the particular handicapping condition of the child under review.

(c) Days means school work days.

(d) A handicapped child means a person under the age of twenty-one who is entitled to attend public schools pursuant to Section thirty-two hundred two of the Education Law and who, because of mental, physical, or emotional reasons, can receive appropriate educational opportunities from special services and programs to include, but not limited to, transportation, special classes, part-time programs, resource programs, alternate learning centers, home instruction and special teachers; State-operated or State-supported special schools or other special facilities; pupil personnel services; and/or those services, facilities, or programs which can be obtained through contracts with boards of cooperative educational services, public school districts, approved nonpublic schools, or other agencies approved by the department.

(1) A mental reason means a condition which impairs or limits the child's intellectual functioning.

(2) A physical reason means a condition which incapacitates the child and includes orthopedic, visual, auditory, neurological and other medical or organic conditions which result in inability to benefit from the regular educational programs for nonhandicapped children without some form of special services or programs.

(3) An emotional reason means a condition of psychosocial origin leading to behavior which interferes with the child's ability to adjust to and benefit from existing regular class programs.

(e) Home instruction means instruction provided on an individual basis for a handicapped child confined to the home, hospital, or other institution because of the handicapping condition.

(f) Impartial hearing officer means an individual assigned by a board of education to hear an appeal and make recommendation to such board in accordance with the provisions of Education Law Section 4404. An impartial hearing officer shall be:

(1) unbiased, having no prejudice for or against any party involved in the hearing;

(2) disinterested, having no personal interest in the outcome; and

(3) independent, who is not an officer, employee, or agent of the school district or of the BOCES of which such school district is a component, and shall not have participated in any manner in the formulation of the recommendation sought to be reviewed.

(g) An individual psychological examination means a comprehensive process by which a school psychologist uses a variety of psychological and educational techniques in the child's dominant language, to study and describe a pupil's developmental, learning, behavioral, and other personality characteristics for the purpose of educational planning.

(h) Notice means (1) written statements in English and/or in the dominant language of the parent's home, and (2) oral communication in the dominant language of the home. In the event that the parent is deaf, notice will mean communication by all means which are feasible and appropriate.

(i) Parent means a natural mother or father, foster parent, or person in parental relation, or a legally appointed guardian or a surrogate parent for a child appointed in accordance with the procedures set forth in Section 200.5 and 200.7 of this Part, and shall also include a child who has reached the age of eighteen.

(j) Part-time program means any special education program in which a child is enrolled for less than full-time.

(k) Resource program means a program provided in an area of adequate size to accommodate a certified special education teacher, a small group of students as well as the specialized equipment necessary for instruction of handicapped children registered in special or regular classes, used for varying periods during the day for children who are in need of specialized supplementary instruction. Itinerant teacher service is defined as a type of resource program.

(l) School psychologist means one who is certified as such and who is employed by a school district or board of cooperative educational services.

(m) Special class means a class consisting of handicapped children who have been grouped together because of similar educational needs for the purpose of being provided a program of special education under the direction of a certified special education teacher.

(n) Special education teacher means one who is certified to provide instruction to handicapped children, or one who provides supplementary instructional services to handicapped children.

(o) Surrogate parent means a person appointed to act in place of parents or guardians when a child's parent or guardians are not known, are unavailable or the child is a ward of the State.

(p) Program or educational placement means a special education program based on evaluation of a child's abilities and needs and handicapping condition.

(q) Change in program/educational placement means a change in the disability/handicapping classification of a pupil, transfer to a different type of program, or the transfer from one agency or school district or BOCES jurisdiction to another.

Section 200.2 State aid to school districts for the education of pupils with handicaps. (a) For the purposes of apportionment of special services aid under section 3602 of the Education Law, the definitions of severly handicapped pupils shall be:

(1) Severely crippled and health impaired--a child who must function in a physical environment specially designed, or who needs medication intervention and/or maintenance.

(2) Severely handicapped (deaf)--a child with a hearing handicap in excess of 80 decibels (ISO) in the better ear whose degree and type of hearing loss is so severe that spoken language cannot be acquired normally and whose receptive and expressive communication skills are so limited that additional supportive services are provided.

(3) Severely emotionally disturbed--a child whose emotional disturbance is so severe that the child is unable to relate to other children and may have an absence of speech, and in addition needs the support of clinical services. A severely emotionally disturbed child is one whose condition has been determined to be such by a school psychologist, a psychiatrist, or by an approved mental health clinic.

(4) Multiply handicapped--a child who, because of the multiplicity of his handicapping conditions, requires intervention by more than one certified specialist in the area of education of the handicapped. For purposes of this section, visually impaired children shall be included, but those children whose second handicap is solely in the area of speech shall not be included.

(5) Trainable mentally retarded--a child who, on the basis of a comprehensive evaluation, such evaluation to include an individual psychological examination, is determined to possess general intellectual capacity that falls lower than three standard deviations below the mean of the general population, cannot profit from programs established for the educable mentally retarded, but may be expected to profit from special programs for the trainable.

(b) For the purposes of apportionment of weighted aid pursuant to Section 3602 of the Education Law, the definition of pupils with handicapping conditions shall be:

(1) Trainable mentally retarded--a child who on the basis of a comprehensive evaluation, such evaluation to include an individual psychological examination, is determined to possess general intellectual capacity that falls lower than three standard deviations below the mean of the general population, cannot profit from programs established for the educable mentally retarded, but may be expected to profit from a special education program for the trainable.

(2) Educable mentally retarded--a child who on the basis of a comprehensive evaluation, such evaluation to include an individual psychological examination, is determined to possess general intellectual capacity that falls lower than 1.5 standard deviations below the mean of the general population, cannot profit from regular classroom instruction, but may be expected to profit from a special education program.

(3) Severely speech impaired--a child with unintelligible speech or inability to communicate verbally, who is provided daily instruction in regular or special classes by a certified teacher of the speech and hearing handicapped.

(4) Hearing impaired--a child with a hearing handicap in the 40 and above decibel range (ISO) whose hearing loss precludes his functioning normally in a regular classroom situation without the supportive services of a resource program.

(5) (i) Visually impaired--a legally blind child with the visual capacity of 20/200 or less in the better eye with the best correction, or a field of vision restricted to a 20 degree arc.

(ii) Partially sighted--a child whose visual acuity in the better eye with best correction ranges between 20/70 and 20/200, including those children who can still function capably with their residual vision and who have a medically indicated progressive visual loss, or a recurring serious medical eye problem affecting acuity and operable eye diseases.

(6) Emotionally disturbed--a child whose condition has been determined to be such by a school psychologist, a psychiatrist; or by an approved mental health clinic.

(7) Physically handicapped--a child who manifests a condition which incapacitates the child and includes orthopedic, neurological, and other medical conditions which result in inability to benefit from the regular educational programs for nonhandicapped children, without some form of special assistance.

(c) Each school district which receives an apportionment for severely handicapped pupils and/or for pupils with handicapping conditions shall use such apportionment for educationally advantageous programs. An educationally advantageous program shall mean an instructional program having the following characteristics:

(1) activities and services which are in accordance with the provisions of subdivisions (a) and (b) of this section and section 200.4 of this Part, and which are clearly designed to achieve educational objectives which are consistent with the handicapping conditions of the pupils served.

(2) expenditures which are directly related to such activities and services.

(d) Each school district which receives special services aid for severely handicapped pupils and/or an additional apportionment of weighted aid for pupils with handicapping conditions shall have prepared and submitted to the commissioner acceptable plans describing the use of such apportionment, prior to September 1, 1974, and on September 1, every third year thereafter. Each district plan shall be in a form prescribed by the commissioner, and shall include, but need not be limited to, the following:

(1) identification of the number and grade span of pupils to be served by type of handicapping condition,

(2) the method to be used to evaluate the extent to which the objectives of the program have been achieved;

(3) the budget for the expenditure of such apportionment

(4) the date on which such plan was adopted by the board of education.

(e) Each school district which receives special services aid for severely handicapped pupils and/or additional apportionment of weighted aid for pupils with handicapping conditions shall prepare and submit, on or before October 1 immediately following the close of the school year on June 30, complete annual reports in a form prescribed by the commissioner which shall include, but not limited to the following:

(1) a description of the expenditure of the preceding year's apportionment of aid for eligible pupils;

(2) the number of pupils served in the programs and how they were identified as pupils having such needs;

(3) an evaluation of the results obtained from the operations of such programs.

Section 200.3 Committee on the handicapped.

(a) Each school district shall provide for each handicapped child a physical examination in accordance with the provisions of section 904 of the Education Law, an individual psychological examination by a school psychologist, a social history, and such other suitable examinations and evaluation as may be necessary to ascertain the physical, mental and emotional factors which contribute to the handicapping condition. The reports of all such examinations shall be provided to the committee on the handicapped, which shall be established in accordance with the provisions of Education Law section 4402. In the City School District of the City of New York, the board of education of such district shall appoint a committee on the handicapped for the district and such subcommittees as the board finds to be appropriate, which may be assisted by subcommittees appointed by community school boards in accordance with the provisions of subdivision (b) of this section.

(b) The boards of education of city school districts, the community school districts of New York City, or any school district having in excess of 200 handicapped pupils may appoint subcommittees to assist the committee on the handicapped of such districts in accordance with the provisions of this subdivision.

(1) The board of education shall determine the number of subcommittees to be appointed, upon the recommendation of the committee on the handicapped.

(2) The membership of each subcommittee shall be similar in composition to that of the committee on the handicapped.

(3) Except as provided in paragraphs (4) and (5) of the subdivision, each subcommittee may perform the functions for which the committee on the handicapped is responsible pursuant to the provisions of Education Law section 4402.

(4) In the event that the recommendation of the subcommittee concerning a modification or change in the identification, evaluation, educational placement or provision of a free appropriate public education to a pupil is not acceptable to the parent or legal guardian of such a pupil, the subcommittee shall refer the matter to the committee on the handicapped.

(5) Each subcommittee shall report annually the status of each handicapped child within its jurisdiction to the committee on the handicapped.

Section 200.4 Public Educational Programs. (a) Special classes (general) (1) The formation of special classes, including grouping and numbers, shall depend upon the severity of the children's handicaps, capabilities and educational, social or emotional needs as defined in 200.2.

(2) Where the handicapping condition does not preclude functional participation in activities with non-handicapped children, special classes shall be located in public school buildings where there are classes in regular education for children of similar chronological ages in order to promote participation of handicapped children in regular school activities. Adequate classroom space, facilities and equipment shall be provided for each special class.

(3) Evaluations shall be conducted as frequently as the committee on the handicapped shall direct, provided that each child's educational program shall be evaluated annually.

(4) All teachers in special class programs shall be appropriately certified as teachers of handicapped children.

(b) Special classes (specific). (1) Special classes for children handicapped because of severe physical reasons. School districts may organize special classes for children who are blind, deaf, orthopedically handicapped or neurologically impaired, in accordance with the following criteria:

(i) The chronological age range of the children served shall not exceed three years.

(ii) The special class register at the elementary level shall not exceed 10 children, and at the secondary level shall not exceed 15 children.

(2) Special classes for children handicapped because of severe emotional reasons.

(i) The chronological age range of the children served shall not exceed three years.

(ii) The special class register shall not exceed 8 children at either elementary or secondary levels.

(3) Special classes for the mentally retarded.

(i) Special classes for the educable mentally retarded as defined in Section 200.2.

(a) The chronological age range of children in a special class shall not exceed three years.

(b) The total register in a special class at the elementary level shall not exceed 15; at the secondary level it shall not exceed 18.

(ii) Special classes for trainable mentally retarded as defined in Section 200.2

(a) The chronological age range of children in a special class shall not exceed four years.

(b) The total register in a special class for children through the chronological age of 12 shall not exceed 10 children; for children over the chronological age of 12, it shall not exceed 12 children.

(4) Special classes for children handicapped because of multiple reasons. Special classes in this category include classes for children whose combination of handicaps is such that the programs of the special classes in paragraphs (1), (2), and (3) are not adequate for the special education needs and services necessary for these children.

(i) The register of children in such classes shall be based on the needs of the children as well as chronological age, but shall not exceed 8 children.

(ii) Intervention by more than one certified specialist in the area of special education is required.

(5) Upon application and justification, approval may be granted for variance from the chronological age ranges and special class enrollments specified in the paragraphs above.

(c) Resource Programs (General)

(1) The formation of resource programs as instructional service options shall depend upon the nature of the child's capabilities and individual needs. The program recommendation shall be made by the committee on the handicapped.

(i) The total caseload for resource programs serving children with different handicapping conditions shall not exceed 15.

(ii) Each handicapped child in a resource program shall receive at least one hour of individual or small group instruction, five days a week. A small group shall not exceed 3 handicapped children. Pupils shall spend not more than fifty percent of their time during the day in the resource program.

(iii) The teacher shall be certified in the appropriate area of special education related to the child's handicapping condition(s).

(d) Resource programs - educable mentally retarded, emotionally disturbed, physically handicapped. (Physically handicapped shall include orthopedically handicapped, neurologically impaired, i.e., brain injured and other medical conditions.)

(i) The service shall be provided by a resource program teacher certified in an appropriate category of special education for a minimum of one hour each day, five days a week.

(ii) The special instructional service to the above categories of handicapped children shall be provided by certified teachers of special education, deaf, speech and hearing handicapped or blind and visually handicapped.

(iii) The maximum teacher load for resource programs for handicapped children with one handicapping condition shall be limited to:

(a) 15 emotionally disturbed or 15 neurologically impaired children, or

(b) 20 educable mentally retarded or 20 orthopedically handicapped children

(c) appropriate total teacher caseload for other medical conditions, shall be determined on the basis of individual review of specific medical conditions establishing eligibility, appropriate service and handicapped pupil need, however, shall not exceed 15.

(e) Resource programs for visually impaired and partially sighted.

(1) Special instructional services for visually impaired children who are totally blind and require the use of braille and legally blind children whose vision can be utilized as the channel for learning shall be provided services by certified teachers of the blind and partially sighted.

(i) Individual or small group instructional services for visually impaired elementary age children shall be for a weekly minimum of 7 hours and for secondary age children a minimum of 5 hours.

(2) Individual or small group instructional services shall be provided to partially sighted children for a minimum of 45 minutes daily, 5 days per week, by teachers certified in the areas of the blind and partially sighted or special education.

(f) Resource programs - severely speech impaired

Severely speech impaired pupils shall be provided instructional service by a certified teacher of the speech and hearing handicapped.

(i) The total teaching load for teachers in a resource program for severely speech impaired shall be 18 handicapped pupils during a 6-hour day:

(a) Individual service shall be provided for 30 minutes each day, 5 days per week.

(b) Groups of 2 shall be provided service for 45 minutes each day, 5 days per week.

(c) Groups of 3 shall be provided service for 60 minutes each day, 5 days per week.

(ii) When severely speech impaired children are provided service by teachers of the speech and hearing handicapped also serving other speech impaired pupils, the total caseload for such teachers shall not exceed 60 children.

(iii) When severely speech impaired and other speech impaired pupils are combined for instructional service, the total caseload will reflect the following formula:

(a) Service to each severely speech impaired child shall be equal to 5 other speech impaired pupils.

(b) One severely speech impaired and 55 other speech impaired shall constitute a total caseload.

(c) Six severely speech impaired pupils and 30 other speech impaired pupils will establish a total caseload.

(g) Resource programs--hearing impaired

Hearing impaired pupils shall be provided daily instructional programs.

(i) Individual service shall be provided by a certified teacher of the speech and hearing handicapped for hard of hearing children for a minimum of 30 minutes a day, 5 days per week.

(ii) Individual service by a certified teacher of the deaf shall be provided to deaf pupils for a minimum of 1 hour, 5 days per week.

(h) Resource programs (combined handicapping conditions).

Children with different handicapping conditions, i.e., educable mentally retarded and neurologically impaired, combined for service shall be provided instruction within a total caseload not to exceed 15 pupils. School districts having fewer than 15 handicapped children may have the resource program teacher provide service to children who are not handicapped, provided that the handicapped and nonhandicapped pupils shall receive instruction at different times. Handicapped children shall receive instruction in groups not exceeding 3, for a minimum of one hour per day, 5 days per week.

(i) Home and hospital instruction. (1) the qualification of teachers providing home and hospital instruction shall be as follows:

(i) For instruction at the elementary level, at least common branch certification, or special education certification, where appropriate under the regulations of the commissioner.

(ii) For instruction at the secondary level, a minimum of certification in the subject area being taught, or, where appropriate, in special education.

(2) A pupil is eligible for home instruction if he is handicapped as defined in Section 4401 of the Education Law, and is unable to attend school.

(3) The schedules for home instruction shall be subject to the individual needs of the child, and except for such individual considerations, shall meet the following requirements:

(i) Instruction at the elementary level shall be for a minmum of five hours per week, preferably one hour per day.

(ii) Instruction at the secondary level shall be for a minimum of 10 hours per week, preferably two hours per day.

(iii) Upon application and justification, approval may be granted for variance.

(iv) The school district shall maintain such records and periodic evaluations as are necessary to provide adequate assessment and appraisal of the progress made during the period of home instruction and readiness to return to a classroom program.

(j) Individualized education program. Each board of education shall provide for the preparation of an individual education plan for each handicapped pupil, in accordance with the provisions of this subdivision. The individual education plan shall be a written statement to meet the unique needs of each handicapped pupil, which shall be developed in a planning conference. An individual education plan shall be prepared at the beginning of the school year, and shall be reviewed, and if appropriate, revised periodically, but not less than annually.

(1) Content of individual education plan. The individual education plan shall include:

(i) A statement of present levels of educational performance of such pupil;

(ii) A statement of annual goals, including short-term instructional goals;

(iii) A statement of the specific educational services and instructional materials to be provided to such pupil, and the extent to which the pupil will be able to participate in regular education programs;

(iv) The projected date for initiation, and anticipated duration, of such services;

(v) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the instructional objectives are being achieved;

(2) Planning conferences. Planning conferences to develop an individual education plan shall be conducted in accordance with the following:

(i) The conference for each handicapped pupil shall be conducted as soon as possible after the beginning of the school year, but no later than the thirtieth day of attendance upon instruction by the pupil;

(ii) Participants at the planning conference shall include a representative of the committee on the handicapped, the pupil's teacher or teachers, the parent or guardian of such pupil and, whenever appropriate, the pupil;

(iii) The notice of the planning conference given to parent or guardian of the pupil shall inform such parent or guardian that the conference will be conducted at a date and time which is mutually acceptable to the parent or guardian and the employees of the school district;

(iv) If it is not possible or practicable for the parent or guardian to attend the conference, other alternatives may be attempted, including individual or conference telephone dicussions.

(v) In order to assure active parent participation, an interpreter may accompany the parent to allow communication in his native or primary language.

Section 200.5 Procedural due process in identification, evaluation and educational placement.

(a) A committee on the handicapped which has reason to believe that a child possesses a handicapping condition to a degree sufficient to warrant provision of special educational services, shall give notice to the parent of its recommendation to the board of education or trustees that the child be classified as possessing a handicapping condition requiring provision of special educational services. Such notice shall:

(1) Describe the proposed classification and the reasons why such classification was deemed appropriate for the child.

(2) Specify the tests or reports upon which the proposed classification was based.

(3) State that the school files, records and reports pertaining to the child will be available for inspection and interpretation. Such records shall be available for review, and for duplication at reasonable cost.

(4) Advise the parent or legal guardian of the child of his opportunity to address the committee, either in person or in writing on the propriety of the committee's recommendations on program placements to be made to the board of education.

(5) Describe in detail the right to obtain a hearing in accordance with the provisions of subdivision (c) of this section if there are objections to the proposed action.

(6) Include a statement of procedures for appealing the decision resulting from the formal hearing.

(7) Include a statement indicating that the parent shall be afforded an opportunity to obtain an independent educational evaluation of the child and which shall include the names, addresses and telephone numbers of appropriate public agencies and other resources within the county where such services can be obtained.

(8) During the pendency of any proceedings conducted pursuant to this section, unless the commissioner of local school district and the parents or legal guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall be placed in the public school program until all such proceedings have been completed.

(b) A committee which recommends to the board of education or trustees that there should be a change in the child's educational program or placement shall give notice to the parent of its recommendation.

Such notice shall:

(1) Describe in detail the proposed change in placement and the reasons why such action is deemed appropriate for the child.

(2) Specify the test or reports upon which the proposed action is based.

(3) State that the school files, records and reports pertaining to the child will be available for inspection and interpretation. Such records shall be available for review, and for duplication at reasonable cost.

(4) Advise the parent or legal guardian of the child of his opportunity to address the committee, either in person or in writing, on the propriety of the committee's recommendations on program placements to be made to the board of education.

(5) Describe in detail the right to obtain a hearing in accordance with the provisions of subdivision (c) of this section if there are objections to the proposed action.

(6) Describe the procedure for appealing the decision resulting from the formal hearing.

(7) Indicate that the parent shall be afforded an opportunity to obtain an independent educational evaluation of the child and which shall include the names, addresses and telephone numbers of appropriate public and private agencies and other professional resources where such services may be obtained.

(8) During the pendency of any proceedings conducted pursuant to this section, unless the commissioner or local school district and the parents or legal guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, be placed in the public school program until all such proceedings have been completed.

(c) Within ten days after receipt of notice of proposed recommendation classifying a child as "handicapped" or within ten days after notice of proposed change in educational program or placement, a parent may request, in writing, an impartial formal hearing which will be conducted in accordance with the following rules:

(1) The board of education or trustees shall appoint an impartial hearing officer to conduct the hearing. The hearing officer shall be authorized to administer oaths and to issue subpoenas in connection with the administrative proceedings before him.

(2) A record of proceedings before the hearing officer shall be maintained and made available to the parties.

(3) At all stages of the procedures, where required, interpreters of the deaf or interpreters fluent in the dominent language of the child's home shall be provided at district expense.

(4) The impartial hearing officer shall preside at the hearing and shall conduct the proceedings in a fair and impartial manner so that all parties shall be afforded an opportunity to present evidence and testimony.

(5) The parties to the proceedings may be represented by legal counsel, and may be accompained by other professional persons.

(6) Unless a surrogate parent shall have previously been assigned, the impartial hearing officer shall, prior to the hearing, determine whether the interests of the child would best be protected by assignment of a surrogate parent.

(7) The hearing should be closed to the public unless the parent requests an open hearing.

(8) The parents, school authorities and their respective counsel shall have an opportunity to confront and question all witnesses at the hearing.

(9) If the child is over the age eighteen, he or she shall have the right to attend the meeting.

(10) If the child has not attained the age of eighteen, the parents shall have the right to determine whether the child shall attend the hearing, except that upon finding of the impartial hearing officer that attendance of the child would be harmful to his welfare, the child may be excluded from portions of, or the entirety of the hearing.

(11) At the conclusion of the testimony, the impartial hearing officer may adjourn the hearing to a specified date not more than 14 days after the conclusion of the testimony to permit the preparation of the transcript. The impartial hearing officer shall transmit one copy of the transcript to the parents, and one copy to the school authorities.

(12) The impartial hearing officer shall submit his recommendation to the board of education within 5 days from his receipt of the transcript. Copies of the recomdation shall also be transmitted by registered mail to the parents and to school authorities. The parents or school authorities may submit objections in writing to the recommendation of the impartial hearing officer to the board of education within five days from the receipt of such recommendation.

(13) The board of education shall render a decision within 5 days after the last day for the submission of objections to the recommendation of the impartial hearing officer. The decision of the board of education shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. The decision shall also include a statement advising the parents of their right to obtain a review of such decision by the Commissioner pursuant to the provisions of Education Law section 310.

(d) When a board of education is notified in writing by a child's parent or guardian, by a professional staff member of that district, or by a licensed physician that there is reason to believe that such child may possess a handicapping condition which would require the provision of special educational services, the board of education shall provide for a determination of eligibility and classification for the pupil's placement in an appropriate special educational service or program in either a public or private facility within thirty days of such notification. Thereafter, if such child is found eligible for special educational placement, the board of education shall arrange for such placement within a further period of no longer than thirty days.

Section 200.6 State aid to blind, deaf, and severely physically handicapped in certain State-operated and State-supported schools provided by Articles 85, 87 and 88 of the Education Law and Chapter 1060 of the Laws of 1974.

(a) Application for State appointments of deaf, blind or severely physically handicapped children to State-supported or State-operated schools for the blind, deaf, or severely physically handicapped shall be initiated by parents through the committee on the handicapped of the school district in which such parents reside. If such request is recommended for approval by the committee on the handicapped, the board of education shall forward to the commissioner the appropriate application form prior to application to any State-supported or State-operated school. The commissioner will direct the parents to make arrangements at a designated State-operated or State-support school for an evaluation. Such school will evaluate the child's eligibility for its program and notify the parents, the board of education, and commissioner of the results of this evalaution and recommend appointment, if appropriate. In the case of a child not recommended for appointment to a particular special school, such notification shall include all reasons for lack of acceptance of the child into the program and recommendation for more appropriate placement. The approval of the commissioner in granting the State appointment, if appropriate, will be determined upon the following criteria:

(1) Only those profoundly deaf, i.e., with a loss in excess of 80 db ISO in the better ear or deaf-blind or severely physically handicapped students between the ages of three and 21, or legally blind students, at least kindergarten age or receiving a special instructional program at the preschool level, who are residents of New York State, may receive appointments to the State-operated or State-supported schools and be included for State support for their education.

(2) Deaf or blind children will be appointed to the school for the deaf or blind nearest their place of residence on a day basis. Residential school week appointments, if available, will be considered only when travel arrangements preclude attendance on a day basis. Exceptions due to student educational needs may be necessary, and will be considered when the board of education presents adequate justification for such placement. Appointments for severely physically handicapped children attending the Human Resources School shall be on a day basis only.

(3) State appointed pupils shall be eligible for transfer between State-operated and/or State-supported schools upon appropriate review and recommendation of the local school district's board of education, with the approval of the commissioner. State-appointed pupils being considered for transfer shall remain in the school they currently attend until an alternate school placement is finalized.

(4) Either the State-supported or State-operated school or school district in which a pupil resides may apply to the commissioner for the termination of the appointment of a pupil. An application for this purpose shall set forth the basis for such action. No appointment shall be terminated until the pupil can be transferred to a more appropriate program without interruption of the continuity of such pupil's education program. Where the presence of a pupil in school poses a continuing danger to persons or property or treatens disruption of the academic process, the State-supported or State-operated school may suspend such student. Upon such action, immediate notification shall be made to the Board of Education for review and appropriate action.

(5) For state aid purposes, the private State-supported schools shall conduct a full instructional program for not less than 180 days during the school year. Calendars of such days in session shall be submitted to the commissioner for approval by July 1 of the preceding school year.

(b) As used in this section, aidable operating expenses shall mean the necessary expenditures for approved education programs provided to State-appointed pupils.

(1) State-supported and State-operated schools shall submit annually at times designated by the commissioner, budget forms containing justification for all proposed expenditures for which State aid is requested. Such budgets shall indicate by line item all positions and items of proposed expenditure. All budgets in connection with other than department funded programs shall be reported on a supplemental sheet similar to the format for state aided programs.

(2) All annual expenditures shall be justified to the satisfaction of the commissioner in accordance with the instructions accompanying the annual year-end report forms submitted by the State-supported and the State-operated schools.

(3) All new positions requested in the annual budget shall be justified in a narrative statement attached to the budget request.

(4) Review of all budgets submitted by the State-supported schools will be guided by the expenditures at the State-operated schools for the deaf and blind. The portion of the salary of each employee which exceeds the salary of an employee having similar duties at the State-operated schools for the deaf and blind shall not be an aidable operating expense of such State-supported private schools.

(5) Budgets approved by the commissioner for a particular school year represent the maximum support for that year. State-supported schools shall limit items of expenditure and positions to those approved by the commissioner. Any transfer between line items of expenditure exceeding ten percent or $1,000, of the approved budget authorization for the school year, must have prior approval of the commissioner.

(6) Capital construction for new buildings, including related service facilities such as heating, sanitary, lighting facilities and improvement of grounds, and additions to accommodate growth or activity not a part of the State program, will not be approved as State aidable operating expenses. Such equipment or furnishings as are necessary to accommodate or maintain the educational program for State-appointed pupils are aidable expenditures, with the prior approval of the commissioner. All necessary repairs, including replacement of roofs, boilers, plumbing systems, installation of safety devices in existing buildings, such as proper exits, fire safety systems and renovations considered necessary for maintaining generally accepted standards of instruction, living arrangement outside of the classrooms, protection of the health and safety of State-appointed students and the preservation of the physical plant may be approved, provided that application to the commissioner is made in advance of the incurring of any obligation. Emergency repairs not exceeding $2,500 may be made without prior approval, but the nature and extent of such repairs shall be promptly reported to the commissioner.

(7) Research activities, programs for non-State appointed pupils and all other activiites with accompanying income and expenditures determined not to be a part of the educational program offered to State appointed pupils will not be considered in determining State support.

(8) Unrestricted funds received by State-supported schools from private sources by gift or bequest shall be used to offset operating expenses. However, the governing board, by resolution adopted during the fiscal year it received the gift or bequest, may restrict such funds for capital use or other programs which are not State-supported. Copies of the resolutions restricting the use of funds from private sources and annual income derived from such funds, and a designation of funds from private sources that have been restricted by the donor, shall be filed with the commissioner as part of the report of expenditures submitted for final payment.

(9) The submission of the claim for final payment shall be accompanied by a report of income and expenditures. Income shall include all funds from governmental agencies and private sources including income derived from capital assets. Expenditures shall include the cost of services and program for State-appointed pupils as well as the costs of other services and programs administered by the school.

(10) State-supported and State-operated schools shall maintain adequate accounting records clearly setting forth the expenses allocable to approved programs and to those additional programs which are not subject to reimbursement.

(11) The accounting records of State-supported and State-operated schools shall be subject to audit and review at times designated by the commissioner and the Department of Audit and Control.

(12) All payments made to the State-supported and State-operated schools will be in accordance with actual expenditures incurred during the school year for which State payment is sought. Final expenditures are subject to audit by Department of Audit and Control.

(c) Services for deaf infants. The eligibility of deaf infants to receive educational services pursuant to section 4204-a of the Education Law, and the approval of educational facilities to provide such services, shall be determined in accordance with the provisions of this subdivision.

(1) For the purposes of this subdivision:

(i) Deaf infant means a child of less than three years of age who has a severe hearing loss which precludes the learning of spoken language through the sense of hearing alone. Infants who are unable to respond to sounds presented at intensities of 90 decibles (db) sound pressure level (SPL) shall be eligible for special educational assistance in order to develop spoken language. Infants of less than two years of age who are unable to respond at 60 decibles (db) sound pressure level (SPL) may be eligible for such services, provided that they have been recommended by a diagnostic agency.

(ii) Approved facilities means the schools for the deaf which are enumerated in section 4201 of the Education Law, and other public and private agencies which have been approved by the commissioner in accordance with the provisions of paragraph (3) of the subdivision.

(2) Eligibility of infant. (i) an annual application for services shall be filed by the parents of deaf infants on forms precribed by the commissioner. The initial application for each infant shall be accompanied by audiological, otological, and other approporiate reports which will be used in determining eligibility for program assistance. If an infant is determined to be eligible, a referral will be made to an approved facility by the commissioner. Continuation in the program shall be dependent upon infant progress reports which shall be submitted quarterly by the facility which each infant attends. If a facility indicates that an infant cannot benefit from the educational program to which such infant has been admitted, the facility shall forward to the commissioner its recommendations for termination of the infant's participation in such program and for any appropriate education services for such infant.

(3) Eligibility of facilities. A facility shall be approved to provide educational services to such infants on an annual basis, following an inspection of such facility, provided that the plant, staff and program thereof meet the following standards:

(i) The facility shall provide an educational program for both infant and parent, which shall include language development, auditory stimulation, speech and speech reading. Language development may include any system of oral or manual communication or combination of both. Such program shall also provide orientation to parents regarding the implications of deafness, developmental needs of deaf infants, and the psychosocial problems encountered by parents of deaf infants.

(ii) An approved facility shall have a physical plant appropriately equipped to serve infants who are deaf, and shall be subject to a site visitation by the commissioner.

(iii) An approved facility shall adhere to all fire and safety regulations of the fire district in which it is located.

(iv) An approved facility shall employ New York State certified teachers of the deaf or speech and hearing handicapped, or hearing clinicians certified by the Department of Health. These teachers must have advanced training and experience.

(v) A register of approved facilities will be maintained by the department.

(4) Payment for services. Approved facilities shall submit quarterly a voucher for educational services rendered in accordance with these regulations. Vouchers shall be accompanied by a record of each infant's attendance and a report of each infant's progress during the period for which payment is requested. Payments shall not exceed $20 for each session of at least 45 minutes of instruction offered to the infant or his parent. The accounting records of an approved facility which received state aid pursuant to the provisions of section 4204-a of the Education Law shall be subject to audit and review by the Department of Audit and Control.

(5) Those approved facilities which are eligible to receive financial assistance through the Department of Health for medicaid patients or for infants approved under the medical rehabilitation program shall seek such assistance for each infant. Infants who are eligible for reimbursement under private insurance or other public health agencies shall not be eligible for tuition assistance. Where educational programming for the deaf infant includes parent orientation sessions which are not eligible for support by the Department of Health or other state or local agencies, the facility may claim that support from the Education Department providing that the facility is approved pursuant to paragraph (3) of subdivision (c) of this section.

Section 200.7 Surrogate Parents

(a) Register. Each school district shall compile a register of individuals willing to appear on behalf of a child under circumstances where a child's natural parents or guardian are unknown or unavailable or where the child is a ward of the State.

(b) Qualifications. Persons selected as surrogate parents shall not be officers, employees, or agents of the local school district or State Education Department involved in the education or care of children, and shall to the maximum extent possible:

(1) Have no other interest which could conflict with their primary allegiance to the child they would represent.

(2) Be committed to acquaint themselves personally and thoroughly with the child and the child's educational needs.

(3) To the maximum extent possible, be of the same racial cultural and linguistic background as the child they seek to represent.

(4) Be generally familiar with the State and local educational system.

(c) Procedures for assigning surrogates. Assignment of a surrogate parent to a particular child shall be made in accordance with the following procedures:

(1) Any person whose work involves education or treatment of children who knows of a child who may need special education services, and who knows that the parents or guardians are not known or are unavailable, or the child is a ward of the State, may file a request for assignment of a surrogate parent to the child with the child's school district.

(2) The school district shall send notice of the possible need for a surrogate parent to the adult in charge of the child's place of residence and to the parents or guardians at their last known address.

(3) The school district shall determine whether the parents or guardians are unknown or unavailable, or whether the child is a ward of the State. This determination shall be completed within a reasonable time following the receipt of the original request for a surrogate parent. If the school district finds that there is a need for a surrogate parent such assignment shall be made by the board of education or trustees within ten days.

(4) Once assigned, the surrogate parent shall represent the child at least through the time of the first periodic review of the child's educational placement. In all instances, where appropriate, the child shall be represented by a surrogate parent throughout the entire review process.

Section 200.8 State assistance for instruction to severely handicapped children in out-of-state facilities under the provisions of section 4407 of the Education Law.

(a) Eligibility of pupils

Satisfactory evidence must be provided that:

(1) The pupil for whom assistance is requested is of school age.

(2) There is present a severe handicap or combination of severe handicaps.

(3) An application to the commissioner has been made by the board of education of the school district in which such pupil resides, which shall include adequate medical and/or psychological examinations, establishing the fact that the child is severely handicapped to the extent that appropriate facilities for instruction are not available within the State.

(b) Eligibility of schools

(1) The facility for attendance at which assistance is requested shall have an adequate and suitable special education program and shall have been approved by the department after a site visit to the facility either by department representatives or pursuant to a recommendation of appropriateness made by public officials of the State where the school is located. Application for approval of such a facility shall be made prior to February 1 of the school year for which the school is requesting approval.

(2) The department will require substantiating data from the facility that it has conducted an adequate and suitable special education program for at least one school year prior to an application for approval under the provisions of Education Law, section 4407.

(3) Facilities and educational programs located outside the continental United States will not be eligible for approval.

(4) Payments to the approved facility shall be utilized by that facility solely for those expenses directly related to the instructional program in accordance with allowable tuition charges as determined by the Commissioner of Education and approved by the Director of the Budget. Audits may be conducted by the Education Department or another State agency, if requested by the Education Department, to determine whether such payments are so utilized.

(5) Where other State agencies or the agencies of other States are involved in the funding of approved facilities, any audits conducted by such agency shall be made available to the department upon written request to the facility.

(6) All approved facilities shall submit by November 15 to the department an annual financial statement for the previous school year, prepared by an independent accounting firm. Such a statement shall include the source of all monies received and shall indicate how these monies were expended. Such a statement shall include information concerning the method used to compute actual instructional costs per pupil.

(7) An educational program report shall be provided by the approved facility to the committee on the handicapped of the referring district, at least annually. Other required data and/or reports shall be made available by the approved facility to the referring district upon request. The local school district and/or board of cooperative educational services may also require that a pupil report for an evaluation by the district or board of cooperative educational services to determine the continued eligibility of such pupil for State assistance pursuant to Education Law section 4407. Failure to comply with requests for information or failure of a pupil to appear for evaluation shall be a cause for denying approval.

(8) When a public or nonpublic facility for instruction has been indicated as not available within the state for a handicapped child, placement in an approved out-of-state nonpublic facility shall be for the entire school year or the balance thereof. No handicapped child shall be removed or transferred from an approved school without the approval of the department.

(9) All approved out-of-state nonpublic schools shall comply with attendance laws in that state applicable to public schools.

(10) All approved out-of-state nonpublic schools shall comply with regulations and/or statutes in that state regarding due process procedures and confidentiality safeguards.

(c) Application

Approval of the commissioner for placement of a severely handicapped child in an approved out-of-state nonpublic educational facility must be requested, and approval must be granted prior to such placement annually.

Section 200.9 Approval of nonpublic schools located within the State under the provisions of section 4402 of the Education Law.

(a) Nonpublic schools for handicapped pupils shall be eligible for approval by the department, for the purpose of contracting with school districts for the education of handicapped pupils, provided such schools meet the criteria established for public school programs for special classes, and special education teachers pursuant to section 200.4 of these regulations.

(b) A report of the annual fire inspection as required by section 807-a of the Education Law shall be on file in the school.

(c) Evidence shall be furnished that the facility has conducted an adequate and suitable special education program for at least one school year prior to approval by the department.

(d) A nonpublic facility shall be required to provide copies of all necessary reports and professional evaluations conducted relative to the program of instruction for the handicapped child to the local district contracting for instructional services for that child.

(e) Charges to school districts shall be determined on the basis of allowable tuition costs, as determined by the commissioner with the approval of the Director of the Budget.

(f) All nonpublic facilities shall be subject to audit by the State and school districts providing funds to that school.

(g) No handicapped child shall be removed or transferred from an approved school without the approval of the school district contracting for a child under section 4402.

(h) All approved nonpublic schools shall comply with the Education Law regarding attendance. Attendance registers shall be available for inspection by appropriate personnel of the contracting district, the department, and the school district in which the school is located.

(i) All approved nonpublic schools shall comply with regulations regarding due process procedures and confidentiality safeguards.

(j) No parent or guardian or any other person shall be required to make any payment for tuition or maintenance on behalf of any handicapped child for whom the district has contracted.

(k) An educational progress report shall be provided by the approved school to the committee on the handicapped of the referring district at least annually. Other required data and/or reports shall be made available by the nonpublic school to the referring district on request.

(l) A parent or guardian of an eligible handicapped child attending an approved school shall not be required to participate in any type of fund raising activity for that school.

(m) When a public facility for instruction has been indicated as not available for a handicapped child, placement in an approved nonpublic facility shall be for the entire school year or the balance thereof. No handicapped child shall be removed or transferred from an approved school without the approval of the school district contracting for the child under section 4402.

(n) Application

An annual application shall be made to the commissioner by the board of education for approval of the placement of a severely handicapped pupil in an approved nonpublic educational facility located within the State. An annual application for the continued placement of a severely handicapped pupil in an approved facility shall be submitted by the board of education to the department prior to June 1.

Section 200.10 State aid for maintenance.

(a) Prior to contracting with an approved private residential school for the instruction of a handicapped pupil in accordance with the provisions of section 4402 of the Education Law, a board of education shall notify the department of the name and the county of residence of such pupil, the name and address of such private residential school recommended, the amount to be charged by such school for maintenance, and the dates upon which such school will commence and terminate residential care of the pupil, and shall submit evidence that there is no appropriate non-residential school available consistent with the needs of the pupil.

(b) Upon approval of the proposed placement, the department shall notify the appropriate municipality of the placement of a pupil in a private residential school, and of its obligation to pay for the maintenance of such pupil at the approved rate pursuant to the provisions of section 4405 of the Education Law.

(c) The department shall reimburse each municipality in the amount of one-half of such maintenance expenditure, less reimbursement to such municipality from any other source on behalf of the pupil.

(d) All claims for expenses incurred in providing residential care shall be paid in the first instance by the board of supervisors or other governing elective body of the county or chief fiscal officer of the City of New York in which such handicapped child resides, upon vouchers presented and audited in the same manner as in the case of other claims against the county or the City of New York.

(d) The clerk of the board of supervisors or other governing elective body of each county or chief fiscal officer of the City of New York which has paid claims shall, not more than once in each month, transmit to the commissioner a certified statement in the form prescribed by the commissioner, stating the amount expended for such purposes and the dates of such expenditures.

(f) Each certified statement for payment by the State pursuant to the provisions of section 4405 of the Education Law shall be submitted to the department not later than 12 months from the last day of the school year within which residential care was provided.

Section 200.11 State assistance for the instruction of handicapped pupils pursuant to section 4406 of the Education Law.

(a) Approval of orders of the Family Court. An order of the Family Court which directs that special educational services be provided to a handicapped pupil may be approved by the commissioner, provided that satisfactory evidence is submitted to establish that such pupil is a handicapped child as defined by section 4401 of the Education Law and:

(1) That such pupil is not eligible for educational services pursuant to Articles seventy-three, eighty-five, eighty-seven, eighty-eight, or eighty-nine of the Education Law; or,

(2) That such pupil meets all the criteria of subdivision one of section 4401 of the Education Law except that the pupil is under the age of five and is not entitled to attend public schools without the payment of tuition pursuant to section thirty-two hundred two of the Education Law and that such pupil is also not eligible for educational services pursuant to Articles seventy-three, eighty-five, eighty-seven, eighty-eight, or eighty-nine of the Education Law.

(b) No order of the Family Court shall be approved with respect to any pupil who has not previously received State assistance pursuant to the provisions of sections 4406 and 4407 of the Education Law to attend such school, or any pupil who is to be enrolled in a private school which has not been approved by the department in accordance with provisions of sections 200.8 and 200.9 of these regulations unless appropriate notification has been received by the department on or before April 15 in the school year for which special educational services are sought. The provisions of this subdivision shall not apply to a pupil enrolled in a school subject to visitation by the commissioner pursuant to Article 85 of the Education Law.

(c) Reimbursement by the State for tuition or maintenance pursuant to the provisions of Education Law section 4406 shall not exceed one-half of the allowable annual rates for tuition or maintenance established for the school which the pupil will attend, or in the case of an educational placement for the months of July and/or August, State reimbursement shall not exceed one-half of the allowable annual rates for tuition and maintenance for such school divided by ten, for each month.

(d) Each voucher for payment by the State pursuant to the provisions of subdivisions 2 and 3 of section 4406 of the Education Law shall be submitted to the department by a county or city not later than 12 months from the date on which a certificate of approval for State aid was issued, or 12 months from the last day of the school year within which special educational services were provided, whichever is later.

Section 200.12 Census of Handicapped Children

(a) The board of education or trustees of each school district shall locate and identify all handicapped children from birth to age 21 who reside in the district. A register of such children shall be maintained and revised annually by the district Committee on the Handicapped.

(b) The board of education or trustees of each school district shall submit the names and addresses of all handicapped children identified pursuant to subdivision (a) of this section to the Committee on the Handicapped by the 15th of October of each year.

(c) The nature of the handicapping condition of each child from birth to age 21 shall be determined by the Committee on the Handicapped.

(d) The board of education or trustees of each school district which is a member of the BOCES shall report the register of handicapped children to the superintendent of the BOCES by the 15th of October of each year.

(e) The board of education or trustees of each school district shall report the number of handicapped children to the State Education Department annually in such form and at such time as the Commissioner shall require.

Section 200.13 Allowable tuition and maintenance rates. The amount which an approved nonpublic school or facility may charge for tuition and/or maintenance for handicapped pupils enrolled in such school or facility pursuant to the provisions of sections 4402 or 4407 of the Education Law shall be determined in accordance with the provisions of section 4401 of the Education Law and this section.

(a) The allowable rates for tuition and/or maintenance at each approved nonpublic school or facility will be determined for the 1977-78 school year and each school year thereafter by no later than the first day of July of such school year.

(b) An approved nonpublic school or facility may apply to the commissioner for an adjustment in the rate such facility may charge for tuition and/or maintenance by no later than the first day of May preceding the school year for which such adjustment is sought. The application shall include an interim financial statement in the form prescribed by the commissioner.

(c) The allowable tuition rate for each approved nonpublic school or facility shall be based upon 180 days of instruction during the September through June school year. If any handicapped pupil attends upon instruction for fewer than 180 days, the amount which an approved nonpublic school or facility may charge for tuition shall be calculated in accordance with the following:

(1) For a pupil whose total days of attendance have been at least 50 percent of the enrollment period, the allowable tuition rate shall be multiplied by the result of the division of the number of days enrolled by 180. Saturdays, Sundays, holidays and other days when school was not in session shall be excluded from the number of days enrolled.

(2) For a pupil whose total days of attendance have been less than 50 percent of the enrollment period, the allowable tuition rate shall be multiplied by the result of the division of the number of days attended by 180. The enrollment period shall not include Saturdays, Sundays, holidays, and other days when school was not in session.

(d) The allowable maintenance rate for each approved nonpublic school or facility shall be based upon the September through June school year. An approved nonpublic school or facility shall deduct one-tenth of the allowable annual maintenance rate from the charge for maintenance for any handicapped pupil for each month during the school year in which residential care was provided to such pupil for fewer than 15 days.